Supreme Court, U.S.
FILED

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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

Hector Vargas, et ano -- Petitioners

vs.

Eric Wughalter, et als -- Respondents

On Petition For A Writ Of Certiorari To
The United States Court Of Appeals
For The Second Circuit

Petition For Writ Of Certiorari

Hector Vargas, Et ano, Pro - Se
416 East 10th Street,
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October 12, 2010

Questions Presented

1. Did the complaint in its allegations contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face?

2. Did the district court and/or the Court Of Appeals For The Second Circuit indicate in what manner and to what extent did the complaint in its allegations failed to contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face?

3. If the complaint allegations failed to contain sufficient factual matter, accepted as true, to state claim to relief that is plausible on its face, should the court below never the less remanded this case back to the District Court For The Southern District Of New York, to permit the petitioners the

opportunity to seek the opportunity to amend its complaint which the petitioner previously requested it from the Court of Appeals for the Second Circuit?

LIST OF PARTIES

[ ] All parties appear in the caption of the case on the cover page.

[X] All parties do not appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

Hector Vargas and Alejandrina Vargas (Petitioners), Eric Wughalter, Tom Torres, Martin Blum, S. W. Management LLC, Stanley Wasserman, Law Firm of Rogers

Wughalter and Kaufman, 2727 Realty LLC, 2727 University Avenue LLC, City of New York, City Marshal Thomas J. Bia, Judge Julia I. Rodriguez, SG2 Management LLC (Respondents).

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IN THE SUPREME COURT OF THE UNITED STATES PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[X] For cases from federal courts: The opinion of the United States court of appeals appears at **Appendix A** to the petition and is

[X] reported at 2010 U. S. App. LEXIS 12073.

[ ] has been designated for publication but is not yet reported; or,

[ ] is unpublished.

The opinion of the United States District Court appears at Appendix B

[X] reported at 2009 U. S. Dist. LEXIS 67129 (S.D.N.Y., July 30, 2009).

[ ] has been designated for publication but is not yet reported ; or,

[ ] is unpublished.

JURISDICTION

[x] For cases from federal courts: The date on which the United States Court of Appeals decided my case was 06/14/2010.

[x] No petition for rehearing was timely filed in my case. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1) ¶ 3

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

STATEMENT OF CONSTITUTIONAL LAW

Fifth and Fourteen Amendments to the United States Constitution ¶ 4, The Eleventh Amendment to the United States Constitution ¶¶ **36, 40, 42, 44**

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MULTIPLE DWELLING LAW AMENDED: Chapter 799, Laws of 1973, § 301, 302 at Appendix 94H - 99H, N.Y.C. Adm. Code § 27 - 217 at Appendix 100H, 101H.

STATEMENT OF THE CASE

The plaintiff's cause of action in the district court consisted of three causes of action. The first cause of action concerned a conspiracy entered into by eight of the twelve defendants consisting of Eric Wughalter, Tom Torres, Martin Blum, S. W. Management LLC, Stanley Wasserman, Law Firm Rogers, Wughalter & Kaufman, 2727 Realty LLC and Julia I. Rodriguez. The first cause of action was based on a conspiracy contention that the plaintiffs' due process rights of the Fifth and Fourteen Amendments to the United States Constitution were violated and also that there was a violation of the **New York State Constitution, Article I, Section 6**, when the said defendants sought to deny the contract rights and benefits which the plaintiffs' were otherwise entitled to pursuant to the terms of a CBA between Local Union 32BJ and its predecessor Union Local 32E of New Rochelle, N.Y., which covered the plaintiffs'

Hector Vargas who was hired as a building superintendant by Mr. Martin Blum in approximately April/May, 1995, and the plaintiffs' commenced employment in the last two weeks of June, 1995, and was covered by an existing CBA. The second cause of action was against the defendant S. W. Management LLC, 2727 Realty LLC, SG2 Management LLC and 2727 University Avenue LLC only and sought to recover the sum of $228,114.00 Dollars, for work, labor and services performed by plaintiff Hector Vargas, as a union building superintendent in a multiple dwelling building under a existing CBA for which sum he had duly demanded and *remained unpaid to this date to him.* Third cause of action was against all the defendants for injunctive relief and for damages. Jurisdiction over this cause of action is conferred by 42 U.S.C. §§ 1981, 1983. This cause of action concerned an *illegal eviction* which also *denied* the plaintiff

the equal protection of the law and in violation of 42 U.S. C. §§ 1981, 1983, rendering defendants liable to plaintiff in law and equity. The acts of defendants individually and in concert, were maliciously and intentionally designed to deprive the plaintiff (along with his family) of his employment and his housing as superintendent with the alleged joint employer, and to injure plaintiff's *reputation* and *character* as a union superintendent. The action of the defendants has been arbitrary, capricious and discriminatory, entitling plaintiff to compensation for emotional distress and embarrassment suffered as a result of defendants' malicious acts.

The Course of Proceedings:

All the defendants were served personally with the copy of the summons and verified complaint in the action which demanded a jury trial. All the defendants

except City Marshal Thomas J. Bias, failed to answer the complaint. City Marshal Thomas J. Bias, answered by his attorney to the court. However, all of the defendants either by letter or orally before the court asked permission to move to dismiss the complaint. The court granted such permission. (Except the Attorney for SG2 Management, which did not submit / serve on the plaintiffs' a copy of its original answer submitted to the district court, with the exception of a letter provided the district court and the district court accepted it as motion to dismiss).

THE DISPOSITION OF THE DISTRICT COURT:

By its memorandum decision filed on July 30, 2009, under the Docket No. 08 Civ. 11378 (DC) the court below, granted all the motions made by the defendants to dismiss the causes of actions. In its decision, the court below, separated into various groups the

defendants, and in dismissing the claim against the Bronx County Housing Judge Julia I. Rodriguez, stated that "The federal action was distinct from the state eviction action. Thus, there is no basis for Vargas's claim that Judge Rodriguez acted without jurisdiction in proceeding with the eviction action. Alternatively the claim against Judge Rodriguez for damages is dismissed under the doctrine of absolute judicial immunity. Judges are immune from damages for civil liability for acts taken in their judicial capacity". (subsequent cites by district court are not quoted). Concerning the plaintiffs' claims against Tom Torres, Martin Blum, S. W. Management LLC, Stanley Wasserman and 2727 Realty LLC, the court below, dismissed such claim "under the doctrine of res judicata". The court below also indicated "Finally, Vargas does not cite § 1983, nor could he as to these defendants, as they are all private parties who were not acting under color of law. Accordingly

Vargas's claim is dismissed." Concerning the claims against Eric Wughalter and Rogers, Wughalter, Kaufman & Corredine, Esqs.. The district court ruled that the plaintiffs' allegation was a bare conclusory one and "fails to state a plausible claim against Wughalter and the Firm. Accordingly, the claim is dismissed." Concerning the claims against SG2 Management and 2727 University Avenue LLC, who are the current owners of the building where the plaintiffs' Hector Vargas worked as building superintendent, the district court stated "Vargas fails to state a claim against these defendants. There is no allegation in the complaint that SG2 Management and 2727 University Avenue LLC were involved in the incidents upon which this case is based, namely the termination of Vargas's employment. Accordingly, plaintiff's claim against these defendants is dismissed." Concerning the claims against the City of New York and City Marshal Thomas J. Bia, the district

court below dismissed the plaintiffs' claims, indicating that the plaintiffs' Vargas had failed "to state a claim against the City." The court further indicated that "Vargas has not alleged that the City violated his constitutional rights or violated his rights under federal law. Moreover, marshals are not City Employees. (N.Y.C. Law Department Ltr. 3/12/09). Thus, Vargas fails to state a claim against the City, and the claim is therefore dismissed." As far as Marshal Thomas J. Bia, is concerned, the district court below accepted as true the allegation by Vargas "that the warrant was defective on its face, the claim against Marshal Bia is untimely. Actions against a City Marshal are subject to a one-year statute of limitations period, as are actions for wrongful eviction. N.Y. CPLR § 215(1) (McKinney 2009); see Jemison v. Crichlow, 139 A.D. 2d 332, 336 (2d Dep't 1988); Kolomensky v. Wiener, 135 A.D. 2d 505, 507 (2d Dep't 1987). Accordingly, because the warrant of

eviction was issued on January 16, 2007, more than a year prior to the filing of the complaint in this case, Vargas's claim against Marshal Bia is untimely and, thus, dismissed." For its CONCLUSION, the district court indicated that "For the foregoing reasons, defendants' motions are granted. The complaint is dismissed, with prejudice. The Clerk of the Court shall enter judgment accordingly and close the case. SO ORDERED. Plaintiffs pro - se appealed to the United States Court Of Appeals For The Second Circuit which affirmed the judgment of the district court that had been entered on August 4, 2009. The complaint had been dismissed by the district court for failure to state a claim. The Court of Appeals reviewed the dismissal of the complaint de novo and indicated that the complaint must contain sufficient factual matter, accepted as true, to state a relief claim plausible on its face. It indicated that the complaint failed to meet this standard. It

affirmed the district court judgment substantially for the reasons the district court indicated in its decision and the appeals court denied plaintiffs other appeal arguments as being without merit. It also denied a motion by some of the defendants for injunction and sanctions against the plaintiff Hector Vargas and removed the other plaintiff pro - se Alejandrina Vargas without cause even though she has been part of this law suit from the very beginning.

REASONS FOR GRANTING THE PETITION

ARGUMENT

I. The District Court Treated The Defendants Motions To Dismiss Like It Was A Motion For Summary Judgment, Which Was Not True.

At a pre - motion conference held before the court on March 19th, 2009, at 10:40 a. m., the transcript of

the district court indicates at ¶ 12, Article 24 lines 14-25, that the plaintiff can submit to the district court concerning anything in writing, law, documents, evidence, affidavits, by April 24, 2009. Also of the same transcript mentioned above, at Article 25, ¶ 12, lines 12-17, the court indicated, that the defendants don't need to answer. They have already answered by moving to dismiss. The district court in its memorandum decision filed July 30th, 2009, stated at ¶ 4, after Article A "Applicable Law, in the second paragraph state: "First, the court accepts plaintiff's factual allegations as true and draws all reasonable inferences in its favor. See id.; see also Vietnam Ass'n for Victims of Agent Orange v. Dow chemical Co., 517 F. 3d 104, 115 (2d Cir. 2008). The court considers only the factual allegations in the complaint and **"any documents that are either incorporated into the complaint by reference or attached to the complaint**

as exhibits." Blue Tree Hotels Inc. (Can.), Ltd. v. Starwood Hotels & Resorts Worldwide, Inc., 369 F. 3d 212, 217 (2d Cir. 2004). Legal conclusions must be supported by factual allegations. Igbal, 129 S. Ct. at 1949. Pleadings that are "no more than conclusions are not entitled to the assumption of truth." Id. At 1950." In the case of Blue Tree Hotels Inc. (Can.), Ltd. v. Starwood Hotels & Resorts Worldwide, Inc., 369 F. 3d 212, 217 (2d Cir. 2004), the court indicated at ¶ 217 paragraph (I) as its standard of review: "I. Standard of Review: [1-4] Our review of a district court's dismissal of a complaint pursuant to Fed. R. Civ. P. 12(b)(6) is de novo, Gryl v. Shire Pharm. Group PLC, 298 F. 3d 1336, 140 (2d Cir. 2002). In ruling on the sufficiency of the complaint, we must accept as true the allegations contained in the complaint and draw all reasonable inference in favor of the

nonmoving party. See id. Our review is generally limited to the facts and allegations that are contained in the complaint and in any documents that are either incorporated into the complaint by reference or attached to the complaint as exhibits. See Taylor v. Vt. Dep't of Educ., 313 F. 3d 768, 776 (2d Cir. 2002); Chambers v. Time Warner, Inc., 282 F. 3d 147, 152-154 (2nd Cir. 2002); Hayden v. County of Nassau, 180 F. 3d 42, 54 (2d Cir. 1999). But we may also look to public records, including complaints filed in state court, in deciding a motion to dismiss. See Taylor, 313 F. 3d at 776, Pani v. Empire Blue Cross Blue Shield, 152 F. 3d 67, 75 (2d Cir. 1998). A dismissal pursuant to Rule 12(b)(6) "is inappropriate unless it appears beyond doubt that the plaintiff can prove no set of facts which would entitle him or her to relief." Sweet v. Sheahan, 235 F. 3d 80, 83 (2d Cir. 2000)."

II. The District Court Was In Error When It Indicated In Its Above Mentioned Memorandum Decision Filed July 30, 2009, That The Plaintiffs' Fail To State A Claim Against The Honorable Judge Julia I. Rodriguez.

The district court took the position that the Federal Action was distinct from the state eviction action. Therefore, there was no basis for the jurisdictional claim. Additionally, the district court indicated that the claim for damages against the Honorable Judge Julia I. Rodriguez, was being dismissed under the doctrine of absolute judicial immunity. The court indicated that judges are immune from Civil Damages for acts made in their judicial capacities (See cases Stump v. Sparkman, 435 U.S. 349 (1978); Also (See case Pierson v. Ray, 386 U.S. 547 (1967). In making the above mentioned determination, the district court completely

ignored the **"Effect upon jurisdiction of state court of 28 U.S.C. § 1446 relating to removal of cause to federal court [See ALR Digests, Removal of Causes § 37]."** The two joint employers of Mr. Vargas had terminated his employment and commenced an eviction proceedings in the Bronx Housing Court under index no. 9848/05. It was agreed between the parties in this eviction proceedings that the matter would be adjourned for the purposes of arbitration. Although the arbitrator found against Mr. Vargas, he through his attorney at the time, the late Morris Markowitz, Esq., obtained a stay of the proceedings before the Bronx Housing Court from the Bronx Supreme Court, in a CPLR Article 75/78 review, which had his local union local 32BJ and his two joint employers as separate defendants. Before the initial hearing date of the Bronx Supreme Court action, could take place, Mr. Vargas union local 32BJ with the **consent** of his two joint alleged employers,

"**removed**" the Bronx Supreme Court Action as a matter of right, to "the Federal District Court for the Southern District of New York" and to abide by its decision. This matter came before the district court under Docket no. 05 Civ 9992 (KPC), in a § 301 (a) LMRA action. On October 23/24, 2006, the Honorable Federal District Judge Castel, issued his comprehensive decision/order and judgment, in which he granted summary judgment to the defendants but **denied all other reliefs to the parties** thereto, and **did not remand** the case back to the **state court for consideration of any other remaining issues** (See Johnson v. Jumelle, 359 F. Supp. 361, 363, S.D.N.Y. (1973)), wherein it was indicated,: **"When the case was** properly removed to this court, the jurisdiction of the state court ceased **and we do not think that even the consent of all the parties (which perhaps we can infer from the lack of opposition to the motion to**

remand) could empower us to divest this court of jurisdiction and to confer jurisdiction on the state court absent statutory authorization. Lawton v. Blitch, 30 F. 641 (C.C.S.D. Ga. 1887)." Without regard to this determination, Judge Julia I. Rodriguez, of the Bronx Housing Court, ***over jurisdictional objections made by Mr. Vargas* and *his late attorney, Morris Markowitz, Esq.*,** subsequently proceeded, to award summary judgment in January 16, 2007, under index no. 9848/05, and granted the eviction award against Mr. Vargas and his family, in the complete absence of all and any jurisdiction in this matter to act. 28 U.S.C. § 1446(e) states: **"Promptly after the filing of such petition and bond the defendant or defendants shall give written notice thereof to all adverse parties and shall file a copy of the petition with the clerk of such State court, which shall effect the removal and the State court shall proceed no further unless and**

until the case is remanded." Additionally, where a judge has acted as herein in the complete absence of any and all jurisdiction, **he/she is not immune from civil liability as the district court has indicated in its decision** (See the cases cited by the district court namely: *Stump v. Sparkman*, Supra, and Pierson v. Ray, Supra).

III. The District Court Was In Error To Separate The Conspiracy Claims

The claims against the various defendants including the separation of the defendants Tom Torres, Martin Blum, S. W. Management LLC, Stanley Wasserman and 2727 Realty LLC, from its attorneys Eric Wughalter and its law firm Rogers, Wughalter & Kaufman. The attorneys are licensed in New York State by the Office of Court Administration, an arm of the State. To begin

with, the complaint against these defendants in this action, is that they continued their conspiracy against the plaintiffs' over its objections on jurisdiction subsequent to the Decision/Order and Judgment of Federal District Court Judge Kevin P. Castel, under docket no. 05 Civ 9992 (KPC), by pursuing further the case under index no. 9848/05, in the Bronx Housing Court, by moving for summary judgment against the defendants therein and obtaining summary judgment, a judgment of possession, and a warrant of eviction from the court, which was defective on its face and should have been returned immediately to the Bronx Housing Court for its correction (See case of 114 East 84th Street Associates v. Albert, 128 Misc. 2d 753, 490 N.Y.S. 2d 951 (N.Y. City Civ. Ct. 1985). The warrant was defective on its face because it sought to evict the plaintiffs' herein from the illegal basement facilities (put there by the landowner itself namely 2727 Realty LLC and by the

plaintiffs' other alleged employer S. W. Management, LLC) and not from the specific apartment it occupied. This was a violation of the Housing law of New York City as determined by applicable common law. Additionally, the district court was in error, to dismiss the claims against the above mentioned defendants on the ground of the doctrine of res judicata. This was a motion to dismiss the complaint to the district court before any of the above mentioned defendants had answered the complaint of the plaintiffs'. In the case of Monahan v. New York City Dept of Corrections, 214 F. 3d 275, 283 (2nd Cir. 2000), the court indicated: **" [1,2] Although res judicata is an affirmative defense that should be raised in the defendants answer, the district court has the discretion to entertain the defense when it is raised in a motion for summary judgment, by construing the motion as one to amend the defendant's answer. Block First Blood Assocs.,**

988 F. 2d 344, 350 (2d Cir. 1993). We review the district court's decision to grant a party leave to amend for abuse of discretion. Tokio Marine and Fire Ins. Co. v. Employers Ins. Of Wausau, 786 F. 2d 101, 103 (2d Cir. 1986)." At page 8 of its memorandum decision, the district court indicated, **"Judge Castel's dismissal of that case was a final determination on the merits as well."** If such is the case, then how can the district court justify its position that it was alright for the above mentioned defendants to continue its case at the Bronx Housing Court before Judge Julia I. Rodriguez, who the district court indicated she had distinct jurisdiction of the matter, in the **face of the Federal District Court Judge Kevin P. Castel's final determination denying any other relief to any of the parties.** Also, neither did Federal District Judge Kevin P. Castel, **remand** the case back to the **Bronx Supreme Court**, where it was **originally removed** from,

with **consent** of the two joint alleged employers, and to **abide by the Federal District Court Decision/Order and Judgment**. The district court also was in error, by taking its position that the arbitrator's opinion and award was entitled to a res judicata effect. Once again, **it is necessary to point out** that Judge Castel's final determination **denied** any **other relief** to **any of the parties** without **remanding** the case back to the **State Court** for the **purpose of further determination** of **any State issues**. Also, the **arbitration award** of the **Arbitrator Robert Herzog**, *was* **never confirmed** by the **Bronx Supreme Court either before or after** the case had been **removed** by the **union local 32BJ** and **the alleged employers** to the Federal District Court for the Southern District of New York and, therefore was under the New York Law CPLR Article 75 and 78, of **no force and effect** (See **Judge Leo Glasser** who indicated in his opinion in the case of Sewell v. New

York City Transit Authority, 809 F. Supp 208, 213 (F.D.N.Y. 1992): "that under New York Law, an arbitration award is only enforceable if it is confirmed by a court in an Article 75 proceeding and filed with the court in accordance with N.Y. Civ. Prac. L. & R. § § 7510, 7514 (Mckinney 1980). Leddy v. Standard Drywall, Inc., 875 F. 2d 383, 385 (2d Cir. 1989) (citing Flora Fashions Inc. v. Commerce Realty Corp., 80 N.Y.S. 2d 384, 386 (Bronx Co. 1948)). **"[I]t is the judgment entered on an arbitration award that is given preclusive effect in subsequent litigation." Leddy, 875 F. 2d at 385 (emphasis in original) (citing Springs Cotton Mills v. Buster Boy Suit Co., 275 A.D. 196, 199, 88 N.Y.S. 2d 295, 298 (1st Dep't 1949), aff'd, 300 N.Y. 586, 89 N.E. 2d 86, 87 (1st Dep't), aff'd, 74 N.Y. 2d 879, 547 N.Y.S. 2d 841, 547 N.E. 2d 96 (1989); but see Matter of Ranni's Claim, 58 N.Y. 2d 715, 458 N.Y.S. 2d 910, 444**

N.E. 2d 1328 (1982) (applying collateral estoppels to bar relitigation of issues raised in arbitration proceeding in subsequent administrative proceeding without discussing whether the award was ever confirmed or judgment ever entered).". See the case of **"Mattson v. Jarmag Realty Corp., the Bronx** Supreme Court at 116 N.Y. (Supplement) 2d 508 (1952)"), which decided that a union employee was not lawfully terminated prior to arbitration and could not be summarily dispossessed." The district court was in error, when it took its position at ¶ 8 of its memorandum decision above mentioned, that "First, the arbitration award between Vargas and 2727 was a final determination on the merits. Because the arbitration is not being applied against a subsequent § 1983 suit, the general rule that an arbitration award has res judicata effect applies." As was indicated in the case of Sewell v. New York City Transit Authority, Supra, that in New

York, an arbitration award **can only be** enforced when confirmed by a court under CPLR Article 75 proceeding and after filed with the court pursuant to CPLR § 7510, 7514. That it is the judgment which is entered on a arbitration award which is given the preclusion effect in subsequent litigation. Because the CPLR Article 75/78 proceeding which Mr. Vargas brought by his late attorney, Mr. Morris Markowitz, was removed with the consent of his alleged two joint employers, there was never a confirmation under New York common law (see above ¶ ¶ 24-26 of **Judge Leo Glasser** who indicated in his opinion in the **case** of Sewell v. New York City Transit Authority, Supra) of the arbitration award and any opportunity for such confirmation, was lost, and therefore, the said arbitration award cannot be the basis for res judicata. The district court was in error, when it indicated in its memorandum decision above mentioned, that the arbitration was not being

applied against the subsequent § 1983 suit, and therefore the arbitration award was entitled to have res judicata effect. See at paragraph 14 of the plaintiffs' verified complaint that "**JURISDICTION**: is based on 28 U.S.C. § 1931, 42 U.S.C. § § 1983, 1985(3)." The arbitration award was made on August 15, 2005, and the plaintiffs' action in the district court was commenced on/or about 2008. Also, as was indicated, by the district court, at page 7 of its memorandum decision mentioned above, "The Supreme Court, however, has refused to give preclusive effect to arbitration proceedings in certain circumstances, such as when they would foreclose a subsequent § 1983 action. See McDonald v. City of West Branch, 466 U. S. 284 (1984); see also Chicago Teachers Union, Local No. 1 v. Hudson, 475 U.S. 292, 308 n. 21 (1986) (citing McDonald for the proposition that the "arbitrator's decision would not receive preclusive effect in any subsequent § 1983 action");

Dean Witter Reynolds, Inc. v. Byrd, 470 U. S. 213, 222 (1985) (holding that McDonald held that no "judicially fashioned rule of preclusion...permits a federal court to accord res judicata or collateral estoppels effect to an unappealed arbitration award in a case brought under 42 U.S.C. § 1983")." The complaint in this action is based on a § 1983 claim, and the district court has prejudiced the plaintiffs by separating the defendants into five separate groups of defendants and in the case of its grouping of the defendants Tom Torres, Martin Blum, S. W. Wasserman LLC, Stanley Wasserman, and 2727 Realty LLC, which the district court has ruled in its memorandum decision that they are private parties, and that there is no state actor under color of law and therefore dismissed the plaintiffs claim. In doing so, the district court **ignored** the fact that these defendants were represented by Eric Wughalter, Esq., and its law firm Rogers, Wughalter & Kaufman, which had brought the

eviction proceedings against the plaintiffs. Mr. Wughalter and his law firm, are licensed by the office of Court Administration, which is an arm of the State of New York. The district court was in error to consider the above mentioned defendants as being a group separate and distinct from its attorney. Therefore, the claim of the plaintiffs is based on the fact that **the defendants** were acting under **color of state law**. As to the plaintiffs' claims against SG2 Management LLC and 2727 University Avenue LLC, the district court took the position that since these defendants were not around at the time the claims of the plaintiffs arose, these defendants would have no liability. This view ignores the fact that these defendants are **successors in interest** to the **management** and ownership of premises known by the street address of 2727 University Avenue, Bronx, N.Y. 10468, and therefore these defendants should stand in the shoes of the defendants they have

succeeded to the ownership of subject premises where the plaintiff was employed under a CBA. Plaintiffs claim against the City of New York, is due to the fact that the position of City Marshal can only be obtained by means of an appointment from the Mayor of the City of New York. The district court accepted the allegation of the plaintiffs that the warrant of eviction obtained by the city marshal from the Bronx Housing Court, **was defective on its face**. However, the district court, took the narrow view that the plaintiffs action was subject to the one-year statute of limitation period under the state law, **irrespective** of the **fact** that this **action was based** on the **federal jurisdiction** for a **conspiracy** and should therefore **be subject** to a **three years statute of limitations period for conspiracy under the federal law**. However, the New York State Court of Appeals, **has not ruled on such § 1983 claim** where there is a **Federal Action involved as here**

(See Jemison v. Crichlow cite as 544 N.Y.S. 2d 813 (Ct. App. 1989). The Federal Court should follow and impose its statute of limitations of three (3) years in a conspiracy claim and not the New York State statute. In a fairly recent case, the Supreme Court of the United States, 129 S. Ct. 1937, Ashcroft v. Igbal (2009), indicated in an action involving a complaint that is deemed not sufficiently plausible that the Second Circuit should decide in the first instance whether to remand to the District Court to allow the insufficient pleading party to seek leave to amend his complaint? This is applicable here also, where the district court has ruled that the plaintiffs' complaint is not plausible. The High Court indicated that these two questions should be considered: **1)** Whether the legal wrong asserted was a violation of clearly established law? **2)** Whether the facts pleaded established such a violation? The High Court also indicated that the above two questions

go together and can't be decided in isolation. But what was required is for the court to isolate the deficient pleading. It is the contention of the plaintiff that the district court failed to isolate what it **claimed** to be deficient pleading of facts on the part of the plaintiffs. Instead, it appeared to isolate the plaintiffs by separating various defendants from other defendants although **all** the **defendants** had been made part of the cause of action. Such separation was **prejudicial** to the plaintiffs because then the district court indicated that there was no person acting under the color of state law. For example the district court separated various defendants from their attorneys Eric Wughalter and the Law Firm Rogers, Wughalter & Kaufman. These attorneys are **licensed** by the Office of Court Administration, an **arm** of the State of New York. If the plaintiffs' pleading of facts has been in any way insufficient as pro se plaintiffs to state a plausible cause of action, it should

have been given an opportunity by the district court to amplify its claims with additional factual allegations in those areas where such amplification is necessary to render its claim plausible. The district court should have indicated after its isolation of the pleading where there is a necessity for amplification of the facts by the pro se plaintiffs. Since this was not done by either the district court or the Court of Appeals for the Second Circuit, this court should now do so in the light of the recent decision above mentioned by the High Court which indicated in its **decision** that an **appellate court** has the core competency to **determine** whether a complaint has the **"heft"** to state a claim. Such a task is well within its core competency, the High Court citing the case of **Bell Atlantic v. Twombly**, 550 U.S. 544, 557 (2007). In his letter dated 02/26/09 to Federal District Judge Denny Chin, Assistant Attorney General, Charles F. Sanders, at the bottom of page next to last

paragraph, mis-stated the **law** when he indicated "The only prerequisites to judicial immunity are that the judge not act in the clear absence of all jurisdiction and that he/she be performing a judicial act or one which is judicial in nature. Mireles, 502 U.S. at 11-12; Stump, 435 U.S. at 359, 362; Pierson, 386 U.S. at 553-54." His usage of the conjunction **"and"** was an **error**. He should have used **"or"** instead of "and". In my letter dated March 04, 2009, to Judge Denny Chin, I indicated at paragraph 4 as follows: "This case concerns the actions taken by **Judge Julia I. Rodriguez** in the complete absent of all jurisdictions. It has been **recognized by the highest judicial authority** that there are **two circumstances** from which a **judge is not immune from liability**. These circumstances are as was indicated in the case of Mireles v. Waco 502 U.S. 9 (1991), where the court indicated at ¶ 11 that "first, a judge is not immune from liability for non-judicial

actions, i.e., actions not taken in the judge's judicial capacity. Forrester v. White, 484 U.S., at 227-229; Stump v. Sparkman, 433 U. S., at 360, Second, a judge is not immune for actions, though judicial in nature, taken in the **complete absence of all jurisdictions**. Id., at 356 - 357; Bradley v. Fisher, 13 Wall, at 351." It is my contention that at the date Judge Julia I. Rodriguez made her summary judgment order against me, she was acting in the clear absence of **all** jurisdictions and was therefore **not immune** under the Eleventh Amendment and under the doctrine of absolute judicial immunity." I also indicated, at paragraph 6 of said letter that "it should be noted that by exercising jurisdiction in the absence of any such jurisdiction, Judge Julia I. Rodriguez became personally involved in the matter because she provided the plaintiff over his objection with a due process hearing that he neither sought nor desired. I deem this set of **facts** to constitute a

reverse due process situation where the court gave me due process rights in the **complete absence of all jurisdictions.**" I also stated, at paragraph 7 of said letter that "As was indicated in the case of Farrell v. Burke 449 F. 3d 470 (2nd Cir. 2006) at 484, **"[7,8] "It is well settled in this Circuit that personal involvement of defendants in alleged constitutional deprivations is a pre-requisite to an award of damages under § 1983." Wright v. Smith, 21 F. 3d 496, 501 (2d Cir. 1994) (Citation and internal quotation marks omitted). Because "personal involvement is a question of fact[,] we are governed by the general rule that summary judgment may be granted only if no issue of material fact exist and the defendant[] is entitled to judgment as a matter of law." Williams v. Smith, 781 F. 2d 319, 323 (2d Cir. 1986)."** At paragraph 9 of said letter above mentioned, I concluded as follows: "The real and compelling issue

here relates solely to the enforcement of the decision of this court by the Federal Hon. Judge P. Kevin Castel, under index no. 05 Civ. 9992 (PKC), which case was solely appealed by me and affirmed by the Second Circuit Court of Appeals on October 24, 2007, under index no. 5176/06, and which subsequently the United States Supreme Court failed to grant me Certiorari on October 6, 2008. This case was never sent back nor remanded to the Bronx Supreme Court from where the case had been removed for further action on state issues. What really is an issue here is the vindication of the **Supreme Authority of Federal Law**. There was complete absence of jurisdiction on the part of the Bronx Housing Court, which had been staved by the Bronx Supreme Court prior to the removal of the case as matter of right by union local 32BJ with the **written consent** of my alleged employer 2727 Realty LLC." In the case of Scheuer v. Rhodes, 416 U.S. 232, it is

indicated in the case headnotes, "Petitioners, the personal representatives of the estates of students who were killed on the campus of a state-controlled university, brought these damages actions under 42 U.S.C. § 1983 against the Governor, the Adjutant General of the Ohio National Guard, various other Guard officers and enlisted members, and the university president, charging that those officials, acting under color of state law, "intentionally, recklessly, willfully and wantonly" caused an unnecessary Guard deployment on the campus and **ordered** the Guard members to **perform** allegedly **illegal acts resulting in the students' deaths**. The District Court dismissed the complaints for lack of jurisdiction without the filing of any answer and without any evidence other than the Governor's proclamations and brief affidavits of the Adjutant General and his assistant, holding that respondents were being sued in their official capacities and that the actions were

therefore in effect against the State and barred by the Eleventh Amendment. **The Court of Appeals** affirmed on that ground and on the alternative ground that the common-law doctrine of executive immunity was absolute and barred action against respondent state officials. Held: 1. The Eleventh Amendment does not in some circumstances bar an action for damages against a state official charged with depriving a person of a federal right under color of state law, and the District Court acted prematurely and hence erroneously in dismissing the complaints as it did without affording petitioners any opportunity by subsequent proof to establish their claims. Pp. 235-238." At page 236 of its decision the United States Supreme Court **indicated**: "In dismissing these complaints for want of subject matter jurisdiction at that early stage, the District Court held, as we noted earlier, that the defendants were being sued in their official and representative capacities and

that the actions were therefore in effect against the State of Ohio. The primary question presented is whether the District Court acted prematurely and hence **erroneously** in dismissing the complaints on the stated ground, thus precluding any opportunity for the plaintiffs by subsequent proof to establish a claim. When a federal court reviews the sufficiency of a complaint, before the reception of any evidence wither by affidavit or admissions, its task is necessarily a limited one. The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims. Indeed it may appear on the face of the pleadings that a recovery is very remote and unlikely but that is not the test. Moreover, it is well established that, in passing on a motion to dismiss, whether on the ground of lack of jurisdiction over the subject matter or for failure to state a cause of action, the allegations of the complaint should be construed

favorably to the pleader. "In appraising the sufficiency of the complaint we follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45, 46 (1957) (footnote omitted). See also Gardner v. Toilet Goods Assn., 387 U.S. 167, 172 (1967)." At page 237 of its decision, The United States Supreme Court indicated, **"However, since Ex parte Young, 209 U.S. 123 (1908), it has been settled that the Eleventh Amendment provides no shield for a state official confronted by a claim that he had deprived another of a federal right under the color of state law. Ex parte Young teaches that when a state officer acts under a state law in a manner violative of the Federal Constitution, he "comes into conflict with the superior authority of that**

Constitution, and he is in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct. The State has no power to impart to him any immunity from responsibility to the Supreme Authority of the United States." Id., at 159-160. (Emphasis supplied.). Ex parte Young, like Sterling v. Constantin, 287 U.S. 378 (1932), involved a question of the federal courts' injunctive power, not, as here, a claim for monetary damages. While it is clear that the doctrine of Ex parte Young is of no aid to a plaintiff seeking damages from the public treasury, Edelman v. Jordan, supra; Kennecott Copper Corp. v. State Tax Comm'n, 327 U.S. 573 (1946); Ford Motor Co. v. Dept. of Treasury, 323 U.S. 459 (1945); Grat Norther Life Insurance Co. v. Read, 322 U.S. 47 (1944), **damages** against individual defendants are a permissible remedy in some circumstances notwithstanding the fact

that they **hold public office**. Myers v. Anderson, 238 U.S. 368 (1915). See generally Monroe v. Pape, 365 U.S. 167 (1961); Moor v. County of Alameda, 411 U.S. 693 (1973). In some situations a damage remedy can be as effective a redress for the infringement of a constitutional right as injunctive relief might be in another. Analyzing the complaints in light of these precedents, we see that petitioners allege facts that demonstrate they are seeking to impose individual and personal liability on the named defendants for what they claim -- but have not yet established by proof --- was a deprivation of federal rights by these defendants under color of state law. Whatever the plaintiffs may or may not be able to establish as to the merits of their allegations, their claims, as stated in the complaints, given the favorable reading required by the Federal Rules of Civil Procedure, are not barred by the Eleventh Amendment. Consequently, the District Court erred in

dismissing the complaints for lack of jurisdiction." In a case wherein the defendants-Appellees argued that the district court lack subject matter jurisdiction over the plaintiff's complaint and raised such other defenses of res judicata, collateral 62 estoppels, and laches, the 2nd Circuit, 2005, indicated in Aurecchione v. Schoolman Transp. System, 426 F. 3d 635, 641 "II Discussion [1-3] Where a district court grants a defendant's Rule 12(b)(1) motion to dismiss, an appellate court will review the district court's factual findings for clear error and its legal conclusions de novo. See Luckett v. Bure, 290 F. 3d 493, 496 (2d Cir. 2002). The plaintiff bears the burden of proving subject matter jurisdiction by a preponderance of the evidence. See id. at 497. After "[c]onstruing all ambiguities and drawing all inferences" in a plaintiff's favor, Makarova v. United States, 201 F. 3d 110, 113 (2d Cir. 2000); see also Scheuer v. Rhodes, 416 U.S. 232, 236, 94 S. Ct. 1683, 40 L. Ed.

2d 90 (1974) ("[I]t is well established that, in passing on a motion to dismiss, whether on the ground of lack of jurisdiction over the subject matter or for failure to state a cause of action, the allegations of the complaint should be construed favorably to the pleader."), a district court may properly dismiss a case for lack of subject matter jurisdiction under Rule 12(b)(1) if it "lacks the statutory or constitutional power to adjudicate it." Makarova, 201 F. 3d at 113. [4] Based upon the record before us and following our policy of liberal construction of complaints, we believe Aurecchione's complaint should not have been dismissed for lack of subject matter jurisdiction. Aurecchione's cause of action was still at the pleadings stage, and she made a colorable pleading of subject matter jurisdiction upon which the district court could have relied to adjudicate the complaint. See Compl. ¶¶ 1, 9-14. A liberal construction of the complaint shows that Aurecchione

sufficiently raised the question of whether Title VII of the Civil Rights Act of 1964 is applicable in this instance; this is a federal question over which the district court has subject matter jurisdiction. See 28 U.S.C. § 1331. Moreover, at this stage of litigation (i.e., the pleading stage), it is not necessary for the district court to determine which party shall ultimately prevail. See, e.g., Scheuer, 416 U.S. at 236, 94 S. Ct. 1683 ("The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claim [ ]. Indeed it may appear on the face of the pleadings that a recovery is very remote and unlikely but that is not the test."). [5] Further, even if Aurecchione's stated jurisdictional predicate is defective, we believe the authority granted to a district court (or, for that matter, this Court) by 28 U.S.C. § 1653 would allow Aurecchione to amend her complaint.[3] This Court has long held: "'An application

under § 1653 is, of course, addressed to the discretion of the court, and usually the section is to be construed liberally to permit the action to be maintained if it is at all possible to determine from the record that jurisdiction does in fact exist.'" Cox v. Livingston, 407 F. 2d 392, 393 (2d Cir. 1969) (quoting John Birch Soc'y v. NBC, 377 F. 2d 194, 198-99 (2d Cir. 1967)) (emphasis added in Cox); see also Carson v. Allied News Co., 511 F. 2d 22, 24 n. 4 (7th Cir. 1975) ("When [28 U.S.C.] § 399 was revised and recodified as § 1653 in 1948, the legislative history indicates that the '[s]ection was extended to permit amendment of all jurisdictional allegations instead of merely allegations of diversity of citizenship as provided by section 399 of title 28, U.S.C., 1940 ed.'" (citation to legislative history omitted)). In light of the instant record and given the authority of 28 U.S.C. § 1653, we believe the prudent

course of action in this case is to permit Aurecchione the opportunity to amend her complaint."

The 7th, 8th and 9th Circuits have taken a liberal stance towards the construction of pro-se complaints so that they can be decided on its merits rather than dismissed based on technicalities and subtle distinctions. In the case of Donald v. Cook County Sheriff's Dept., 95 F. 3d 548, 555 (7th Cir. 1996), the court stated: **"B. Appropriate Treatment of Pro Se Prisoner's Complaint [6] It is, by now, axiomatic that district courts have a special responsibility to construe pro se complaints liberally and to allow ample opportunity**

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[3]*Section 1653 of Title 28 reads: Defective allegations of jurisdiction may be amended, upon terms, in the trial or appellate courts. 28 U.S.C. § 1653 (2000).*

for amending the complaint when it appears that by so doing the pro se litigant would be able to state a meritorious claim.[2] Not only is the district court to view the pro se complaint with an understanding eye, but, while the court is not to become an advocate, it is incumbent on it to take appropriate measures to permit the adjudication of pro se claims on the merits, rather than to order their dismissal on technical grounds. Indeed, it is the "well-established duty of the trial court to ensure that the claims of a pro se litigant are given a fair and meaningful consideration." Palmer v. City of Decatur, 814 F. 2d 426, 428-29 (7th Cir. 1987) (citations omitted).

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[2]See, e.g., Duncan v. Duckworth, 644 F. 2d 653, 655 (7th Cir. 1981) (noting "well -established requirement that pro se pleadings be held to less stringent standards than those prepared by counsel"); Munz v. Parr, 758 F. 2d 1254, 1258 (8th Cir. 1985) (pro se complaint not frivolous unless it is "beyond doubt that

Finally, it was indicated in the case of Harris v. Mills, 572 F. 3d 66, 72 (2nd Cir. 2009), that: "Even after Twombly, though, we remain obligated to construe a pro se complaint liberally. See Erickson v. Pardus, 551 U.S. 89, 127 S. Ct. 2197, 2200, 167 L. Ed. 2d 1081 (2007) (per curiam); Sealed Plaintiff v. Sealed Defendant, 537 F. 3d 185, 191 (2d Cir. 2008); Boykin v. Key Corp, 521 F. 3d 202, 213-14, 216 (2d Cir. 2008). As a final thought on why this court should grant certiorari, the further exercise of jurisdiction in

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petitioner can prove no set of facts in support of his claim which would entitle him to relief"); Noll v. Carlson, 809 F. 2d 1446, 1448 (9th Cir. 1987) ("pro se litigant must be given leave to amend his or her complaint unless it is absolutely clear that the deficiencies of the complaint could not be cured by amendment"); Haines v. Kerner, 404 U. S. 519, 520 - 21, 92 S. Ct. 594, 595 – 96, 30 L. Ed. 2d 652 (1972) (less stringent standards for pro se complaint.)"

this matter by the Bronx Housing court under Index No. 9848/05 was without authority and jurisdiction, and as such can be challenged by Hector Vargas, the Petitioner et ano, at any time before any court. (See National School of Visual Education v. Bronx, 89 N.Y. (Supplement) 2d 20, decided by Suffolk County Supreme Court in 1947. The Key number is Courts 37(2)). (See also the discussion concerning final judgments or orders at 2 ALR Fed 765-767), citing various cases including several from the United States Supreme Court. There were no binding final judgment award orders at the time of removal to the Federal District Court other than the stay of the Bronx Supreme Court against the Bronx Housing Court at the time of the removal of the case from the Bronx Supreme Court to the Federal District Court for the Southern District of New York. Under these circumstances, the Bronx Housing Court has no jurisdiction whatsoever to

continue with its proceedings in the Index No. 9848/05 case since the said Federal Court never remanded its case back to the State Court. The fact that the whole basement facilities including the basement super's apartment is illegal for residential purpose without any permit whatsoever **("put the plaintiff's Hector Vargas along with his family in a hazardous, dangerous and unsafe condition not to them only but also to all the residential tenants of the building as well, by his two alleged employers namely 2727 Realty LLC and S. W. Manangement LLC also see Appendix E letter to Maria Suero from SG2 Management ¶¶ 72E & 73E")** and that the petition describes a legal apartment that is occupied by the superintendent, does raise an issue of fact as to the failure to accurately describe the apartment. How can Hector Vargas the petitioner et ano be evicted from an illegal apartment when the apartment alleged to be occupied by the superintendent is

described as an legal one? The court decision and order to evict the superintendent petitioner et ano, Mr. Hector Vargas, is clearly in violation of a prior decision of the Bronx Civil Court in 2001, which indicated that such a state of facts is in violation of RPAPL § 741 (See Anna Del Gigante v. Irina Danilva, 727 N.Y.S. 2d 861, 863 (N. Y.C. Civ. Ct. 2001, Bronx).

SUMMARY

There are three points for granting the petition:

I. The District Court treated the defendants motions to dismiss like it was a motion for summary judgment. Which was not true.

II. The District Court was in error when it indicated in its memorandum decision filed July 30th, 2009, that the plaintiffs' fail to state a claim against the Honorable Judge Julia I. Rodriguez.

III. The District Court was in error to separate the conspiracy claims.

AS TO POINT I: A dismissal pursuant to Rule 12(b)(6) "is inappropriate unless it appears beyond doubt that the plaintiff can prove no set of facts which would entitle him or her to relief." Sweet v. Sheahan, 235 F. 3d 80, 83 (2d Cir. 2000)." Additionally, the courts below considered in its opinions certain defenses raised by the defendants such as res judicata and collateral estoppels which turned the motion into one for summary judgment. This is discussed in Point III above. " [1,2] Although res judicata is an affirmative defense that should be raised in the defendants answer, the district court has the discretion to entertain the defense when it is raised in a motion for summary judgment, by construing the motion as one to amend the defendant's

answer. Block First Blood Assocs., 988 F. 2d 344, 350 (2d Cir. 1993).

AS TO POINT II: In its determination the courts below completely ignored the "Effect upon jurisdiction of state court of 28 U.S.C. § 1446 relating to removal of cause to federal court [See ALR Digests, Removal of Causes § 37]." The plaintiff Hector Vargas, had obtained a stay of the proceedings before the Bronx Housing Court from the Bronx Supreme Court, in a CPLR Article 75/78 review, which had his local union local 32BJ and his two joint employers as separate defendants. Before the initial hearing date of the Bronx Supreme Court action could take place, Mr. Vargas union local 32BJ with the consent of his two joint alleged employers, "removed" the Bronx Supreme Court Action as a matter of right, to "the Federal District Court for the Southern District of New York". The

Honorable Federal District Judge Castel, issued his comprehensive decision/order and judgment, in which he granted summary judgment to the defendants but denied all other reliefs to the parties thereto, and did not remand the case back to the state court for consideration of any other remaining issues. Since the case was not remanded back to the state court, there was no jurisdiction for the Bronx Housing Court to proceed to evict the plaintiffs. Additionally, where a state judge has acted as herein in the complete absence of any and all jurisdiction, the judge is not immune from civil liability. (See *Stump v. Sparkman*, Supra, and Pierson v. Ray, Supra).

AS TO POINT III: The courts below were in error to separate various defendants from their attorneys Eric Wughalter and his law firm, since the attorneys are licensed by the Office of Court Administration, an arm

of New York State. Therefore, it was incorrect for the district court to claim there was no color of state law. The complaint against these defendants in this action, is that they continued their conspiracy against the plaintiffs' over its objections on jurisdiction subsequent to the Decision/Order and Judgment of Federal District Court Judge Kevin P. Castel, under docket no. 05 Civ 9992 (KPC), by pursuing further the case under index no. 9848/05, in the Bronx Housing Court, by moving for summary judgment against the defendants therein and obtaining summary judgment, a judgment of possession, and a warrant of eviction from the court, which was defective on its face and should have been returned immediately to the Bronx Housing Court for its correction (See case of 114 East 84th Street Associates v. Albert, 128 Misc. 2d 753, 490 N.Y.S. 2d 951 (N.Y.C. Civ. Ct. 1985). If the pro - se plaintiffs have

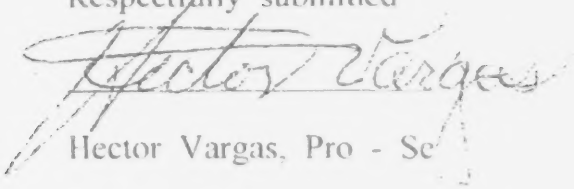
failed to have a plausible complaint, it should be given an opportunity to amend its complaint.

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: October 12, 2010

Respectfully submitted



Hector Vargas, Pro - Se

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Summary Order

Rulings by Summary Order do not have precedential effect. Citation to a Summary Order filed on or after January 1, 2007, is permitted and is governed by Federal Rule of Appellate procedure 32.1 and this Court's local Rule 32.1.1. When citing a Summary Order in a document filed with this court, a party must cite either the Federal Appendix or an Electronic Database (with the notation "Summary Order"). A party citing a Summary Order must serve a copy of it on any party not represented by counsel.

Present: Jon O. Newman,

Chester J. Straub,

Reena Raggi, ***(Filed June 14, 2010)***

Circuit Judges.

Hector Vargas,

Plaintiff-Appellant,

Alejandrina,

Plaintiff,*

v. No. 09-3764-cv

Eric Wughalter, Tom Torres, Martin Blum,

S. W. Management LLC, Stanley Wasserman

Law Firm Of Rogers Wughalter & Kaufman,

2727 Realty LLC, 2727 University Avenue LLC,

City Of New York, City Marshal Thomas J. Bia,

Judge Julia I. Rodriguez, SG2 Management, LLC,

Defendants - Appellees.

**Alejandrina Vargas is not a party before this court because she did not file a notice of appeal. See Fed. R. App. P. 3I(1) (requiring notice to "specify the party or parties taking the appeal"). In any event, like the district court, we would conclude that Hector Vargas's allegations do not pertain to her.*

Appearing For Appellant: Hector Vargas, pro se, New York, New York.

Appearing For Appellees: Howard Rothschild (Robert A. Sparer, Daniel W. Morris, Clifton, Budd & DeMaria, LLP on the brief), New York, New York, for Tom Torres, Martin Blum, S. W. Management LLC, Stanley Wasserman, and 2727 Realty L. L. C. Patrick J. Walsh, Assistant Solicitor General (Barbara D. Underwood, Solicitor General, on the Brief), for Andrew M. Cuomo, Attorney General of the State of New York, New York, New York, for Judge Julia I. Rodriguez. Kenneth D. Litwack, Bayside, New York, for City Marshal Thomas J. Bia.

Appeal from the United States District Court for the Southern District of New York (Denny Chin, Judge).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment entered on August 4, 2009, is AFFIRMED.

Pro-se plaintiff Hector Vargas sued defendants for, inter alia, conspiring to deprive him of various constitutional and contractual rights. He now appeals from the dismissal of his complaint for failure to state a claim. See Fed. R. Civ. P. 12(b)(6). We assume the parties' familiarity with the underlying facts, the procedural history of the case, and the issues on appeal.

We review the dismissal of a complaint de novo. "accepting all factual allegations as true, but giving no effect to legal conclusions couched as factual allegations." Starr v. Sony BMG Music Entm't, 592 F. 3d 314, 321 (2d Cir. 2010) (internal quotation marks omitted). Although we liberally construe Vargas's pro se complaint, see Triestman v. Fed. Bureau of Prisons, 470 F. 3d 471, 474 (2d Cir. 2006), it "must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face,' " Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009) (quoting Bell

Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007)); see also Harris v. Mill, 572 F. 3d 66, 72 (2d Cir. 2009) (applying Iqbal and Twombly to pro se complaint). Our de novo review of the record confirms that Vargas's complaint failed to meet this standard. We therefore affirm the judgment of the district court substantially for the reasons stated in its thorough and well - reasoned decision.

We have considered Vargas's other arguments on appeal and conclude that they are without merit. Accordingly, we AFFIRM the judgment of the judgment of the district court.

We have also considered the motion by defendants 2727 Realty LLC, Stanley Wasserman, S. W. Management LLC, Martin Blum, and Tom Torres for an injunction precluding future litigation by Vargas without his first obtaining this court's approval. Although we DENY defendants' motion to impose a sanction today,

we warn Vargas that filing future meritless appeals may lead to the imposition of monetary sanctions and/or leave-to-file requirements in this court. See In re Martin - Trigona, 9 F. 3d 226, 229 (2d Cir. 1993).

For The Court:

Catherine O'Hagan Wolfe, Clerk of Court

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Hector Vargas and

Alejandrina Vargas,

Plaintiffs, MEMORANDUM

DECISION

- against -

08 Civ. 11378 (DC)

Eric Wughalter, Tom Torres, Martin Blum,

S. W. Management LLC, Stanley Wasserman,

Law Firm of Rogers, Wughalter & Kaufman,

2727 Realty LLC, City of New York, City

Marshal Thomas J. Bia, Judge Julia I. Rodriguez,

SG2 Management LLC,

Defendants.

Appearances: (See last page.)

CHIN, District Judge

Pro se plaintiff Hector Vargas brings suit alleging that defendants conspired to deny him of his contractual rights under his former union's collective bargaining agreement with his former employer.[1] Defendants move to dismiss the complaint. For the following reasons, defendants' motions are granted.

BACKGROUND

A. Facts

The facts underlying Vargas's claims are discussed fully in Vargas v. Service Employees Intern. Union Local Union No. 325-32J, No. 05 Civ. 9992 (PKC), 2006 WL 3019565 (S. D. N. Y. Oct. 23, 2006).

The allegations in the complaint are assumed to be true for purposes of these motions. In summary, Vargas was employed as the superintendent of an apartment building in the Bronx. His employment was terminated in 2004 because, in addition to inhabiting the designated superintendent's apartment, he also illegally inhabited a storage space in the basement of the building. He was later evicted from both the apartment

---

[1] *Alejandrina Vargas is named on the complaint as a plaintiff but the claims do not pertain to her. Accordingly, I refer only to plaintiff Hector Vargas.*

and the storage space. Vargas claims that his former union was "in collusion" with his former employer. (Comp. ¶ 18).

B. Procedural History

The termination of Vargas's employment and his subsequent eviction have been the subject of much litigation in both the state and federal courts. Vargas claimed wrongful termination and his case proceeded to arbitration. On August 15, 2005, an arbitrator found the termination to be for just cause. Vargas subsequently filed an action in Supreme Court, Bronx County, against his form employer, 2727 Realty, LLC ("2727"), and his union, Service Employees International Local Union No. 32B-32J, seeking damages reinstatement to his position, backpay, and an injunction. Vargas's action was removed to the Southern District of New York.

After terminating Vargas's employment, 2727 filed actions in New York City Civil Court seeking his eviction from the superintendent's apartment and the storage space. The Civil Court found against Vargas as to the storage space, issuing an order of eviction. The proceeding concerning the superintendent's apartment, however, was adjourned -- pursuant to a stipulation among the parties -- pending the out come of the federal action.

On October 23, 2006, Vargas's federal case was dismissed. Judge Castel granted summary judgment in favor of defendants, finding that no reasonable fact finder could conclude that the union had breached its duty of fair representation. See Vargas v. Service Employees Intern. Union Local Union No. 325-32J, No. 05 Civ. 9992 (PKC), 2006 WL 3019565, at *1 (S. D. N. Y. Oct. 23, 2006). Vargas appealed but the Second Circuit affirmed Judge Castel's decision. See Vargas v.

Local Union No. 32B-32J, 251 Fed. Appx. 702 (2d Cir. 2007).

After dismissal of the federal case, the Civil Court proceeded with the eviction action against Vargas regarding the apartment. On January 16, 2007, the Court found against Vargas and issued a warrant of eviction. On March 27, 2008, the Appellate Term, First Department, affirmed the Civil Court's decision. See 2727 Realty LLC v. Vargas, No. 570361/07, 2008 WL 802265 (1st Dep't Mar. 27, 2008).

Vargas now brings this action alleging that defendants conspired against to deprive him of his rights. He seeks reinstatement to his former superintendent position and damages. I held a pre-motion conference on March 19, 2009. All defendants expressed a desire to move to dismiss. Some defendants had written the Court expressing this desire; I accepted those letters as motions to dismiss. Other defendants moved

orally at the conference. I advised Vargas that he should submit to the Court, by April 24, 2009, anything he wished to bring to my attention in opposition to defendants' motions. (Tr. 24). On April 22, 2009, the Court received Vargas's opposition to defendants' motions. For the following reasons, defendants' motions are granted.

DISCUSSION

A. Applicable Law

To survive a motion to dismiss pursuant to Rule 12(b)(6), "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009) (citing Bell Atlantic v. Twombly, 550 U. S. 544, 570 (2007). The Supreme Court in Iqbal set out a "two - pronged" approach for courts considering a motion to dismiss. Id. at 1950.

First, the court accepts plaintiff's factual allegations as true and draws all reasonable inferences in its favor. See id.; see also Vietnam Ass'n for Victims of Agent Orange v. Dow Chemical Co., 517 F.3d 104, 115 (2d Cir. 2008). The court considers only the factual allegations in the complaint and "any documents that are either incorporated into the complaint by reference or attached to the complaint as exhibits." Blue Tree Hotels Inv. (Can.), Ltd. V. Starwood Hotels & Resorts Worldwide, Inc., 369 F.3d 212, 217 (2d Cir. 2004). Legal conclusions must be supported by factual allegations. Igbal, 129 S Ct. at 1949. Pleadings that are "no more than conclusions are not entitled to the assumption of truth." Id. at 1950.

Second, the court determines whether the allegations "plausibly give rise to an entitlement to relief." Id. A plausible claim "pleads factual content that allows the court to draw the reasonable inference

that the defendant is liable for the misconduct alleged." Id. (citing Twombly, 550 U. S. at 556). "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." Id. (citing Twombly, 550 U. S. at 557). Determining plausibility is a "context - specific task that requires the reviewing court to draw on its judicial experience and common sense." Id.

B. Application

A pro se complaint is reviewed under a more lenient standard that that applied to "forma pleadings drafted by lawyer." Haines v. Kerner, 404 U. S. 519, 520 (1972) (per curiam). Here, the Court interprets plaintiff's pro se pleadings "to raise the strongest arguments that they suggest." Graham v. Henderson, 89

F. 3d 75, 79 (2d Cir. 1996) (quotations omitted).

1. Claim against the Honorable Julia Rodriguez.

Vargas claims that Judge Julia Rodriguez, a judge of the Civil Court of the City of New York, Bronx County, acted outside of her jurisdiction when she proceeded with the eviction action against him after Judge Castel dismissed his federal case. Vargas argues that Judge Rodriguez acted without jurisdiction because "there had been no remand of the case from the Federal District Court" back to the state Civil Court. (Comp. ¶ 38). For the following reasons, the claim against Judge Rodriguez is dismissed.

Vargas fails to state a claim against Judge Rodriguez. He references two separate actions: (1) his action initiated in Supreme Court, Bronx County, and removed to federal court requesting reversal of the

arbitrator's decision, and (2) the eviction action brought by 2727 in state Civil Court. The federal action was distinct from the state eviction action. Thus, there is no basis for Vargas's claim that Judge Rodriguez acted without jurisdiction in proceeding with the eviction action. Alternatively, the claim against Judge Rodriguez for damages is dismissed under the doctrine of absolute judicial immunity. Judges are immune from damages for civil liability for acts taken in their judicial capacity. Stump v. Sparkman, 435 U.S. 349 (1978); see also Pierson v. Ray, 386 U.S. 547 (1967). Judicial immunity is conferred even if the plaintiff accuses the erroneous the ruling challenged by the plaintiff. Cleavinger v. Saxner, 474 U.S. 193, 199-200 (1985). Here, Judge Julia Rodriguez clearly was acting in her judicial capacity; hence, any claim for damages is dismissed.

2. Claims against Tom Torres, Martin Blum, S. W. Management LLC, Stanley Wasserman, and 2727 Realty LLC.

Vargas alleges that 2727 and its agents named above acted together to deprive him of his rights under the terms of his former union's collective bargaining agreement with 2727. (Compl. ¶ 15). The claim against these defendants is foreclosed under the doctrine of res judicata. Accordingly, the claim is dismissed.

Under the well - settled doctrine of res judicata, a subsequent action is barred where: (1) the prior action concluded with a final adjudication on the merits; (2) the prior in privity with them; and (3) the claims asserted in the present action were, or could have been, asserted in the prior action because they arise from a common nucleus of operative fact. See Monahan v. New

York City Dep't of Corr., 214 F.3d 275, 285 (2d Cir. 2000).

Generally, "a valid and final award by arbitration has the same effects under the rules of res judicata, subject to the same exceptions and qualifications, as a judgment of a court." United States Postal Serv. V. Gregory, 534 U. S. 1, 16 (2001) (Ginsburg, J., concurring) (quoting Restatement (Second) of Judgments § 84 (1982)); see also Streit v. Amdocs, Inc., 307 Fed. Appx. 505, 509 (2d Cir. 2009).

The Supreme Court, however, has refused to give preclusive effect to arbitration proceedings in certain circumstances, such as when they would foreclose a subsequent § 1983 action. See McDonald v. City of West Branch, 466 U. S. 284 (1984); see also Chicago Teachers Union, Local No. 1 v. Hudson, 475 U. S. 292, 308 n. 21 (1986) (citing McDonald for the proposition that the "arbitrator's decision would not receive

preclusive effect in any subsequent § 1983 action"); Dean Witter Reynolds, Inc. v. Byrd, 470 U. S. 213, 222 (1985) (holding that McDonald held that no "judicially fashioned rule of preclusion . . . permits a federal court to accord res judicata or collateral estoppels effect to an unappealed arbitration award in a case brought under 42 U. S. C. § 1983").

Vargas's claim against these defendants is barred by the doctrine of res judicata. First, the arbitration award between Vargas and 2727 was a final determination on the merits. Because the arbitration is not being applied against a subsequent § 1983 suit, the general rule that an arbitration award has res judicata effect applies. Notably, 2727 was also a defendant in the federal case, which, in essence, sought reversal of the arbitration award. Judge Castel's dismissal of that case was a final determination on the merits as well. Second, 2727 and Vargas were and are involved in both

the arbitration proceeding, the federal court proceeding before Judge Castel, and this action. According to Vargas, S. W. Management LLC -- owned by the individual Stanley Wasserman -- owns 2727. Vargas also alleges that Tom Torres is an agent of 2727 and Martin Blum is an employee of 2727. Thus, S. W. Management LLC, Stanley Wasserman, Tom Torres, and Martin Blum are in privity with 2727. See Amadsau v. Bronx Lebanon Hosp. Center, No. 03 Civ. 6450 (Lak) (AJP), 2005 WL 121746, at *8 (S. D. N. Y. Jan. 21, 2005) ("[T] he new defendants have a sufficiently close relationship to the prior defendants [because they] are employees of or closely affiliated with [the prior defendants]."). Third, the claim in the current action arise from the same nucleus of operative facts that formed the basis for the arbitration proceeding and the federal action. Vargas alleges that defendants "conspired" against him to deprive him of his rights under his

former union's collective bargaining agreement with 2727. Vargas's claim is simply a reiteration of his wrongful termination claim, which has now been litigated twice. This suit is his third attempt to litigate the same issues with 2727 (and those in privity with 2727). Finally, Vargas does not cite § 1983, nor could he as to these defendants, as they are all private parties who were not acting under color of law. Accordingly, Vargas's claim is dismissed.

3. Eric Wughalter and Rogers, Wughalter, Kaufman & Corredine, Esq.

Vargas also alleges that Eric Wughalter, Esq., and his law firm, Rogers, Wughalter, Kaufman & Corredine, Esqs. (the "Firm") -- which brought the eviction proceedings on behalf of 2727 -- acted with 2727 to deprive him of his rights. This bare conclusory

allegation fails to state a plausible claim against Wughalter and the Firm. Accordingly, the claim is dismissed.

4. SG2 Management and 2727 University Avenue LLC

SG2 Management and 2727 University Avenue LLC are named as defendants solely because they are the current owners of the building Vargas formerly served as superintendent of and resided in. Vargas fails to state a claim against these defendants. There is no allegation in the complaint that SG2 Management and 2727 University Avenue LLC were involved in the incidents upon which this case is based, namely the termination of Vargas's employment. Accordingly, plaintiff's claim against these defendants is dismissed.

5. The City of New York and City Marshal Thomas Bia

Finally, Vargas brings suit against the City of New York (the "City") and Marshal Bia. Vargas alleges that the warrant of eviction issued against him was defective on its face. The claims against the City and Marshal Bia are dismissed for the following reasons.

First, Vargas fails to state a claim against the City. He explains that he named the City as a defendant because "the City Marshal is a appointee solely by the Mayor of the City of New York and without such an appointment the City Marshall would have been unable to proceed to evict" plaintiff. (Pl. Opp. ¶ 14). Vargas has not alleged that the City violated his constitutional rights or violated his rights under federal law. Moreover, marshals are not city employees. (N. Y. C. Law Department Ltr. 3/12/09). Thus, Vargas fails to state a

claim against the City, and the claim is therefore dismissed.

Second, accepting as true Vargas's allegation that the warrant was defective on its face, the claim against Marshal bia is untimely. Actions against a city marshal are subject to a one-year statute of limitations period, as are actions for wrongful eviction. N.Y. CPLR § 215(1) (Mckinney 2009); see Jemison v. Crichlow, 139 A.D. 2d 332, 336 (2d Dep't 1988); Kolomensky v. Wiener, 135 A.D. 2d 505, 507 (2d Dep't 1987). Accordingly, because the warrant of eviction was issued on January 16, 2007, more than a year prior to the filing of the complaint in this case, Vargas's claim against Marshal Bia is untimely and, thus, dismissed.

Conclusion

For the foregoing reasons, defendants' motions are granted. The complaint is dismissed, with prejudice. The clerk of the Court shall enter judgment accordingly

and close the case. SO ORDERED. Dated: New York, New York, July 30, 2009

"/s/"

Denny Chin
United States District Judge

APPEARANCES

HECTOR VARGAS

Pro Se Plaintiff

416 East 10 th Street

New York, NY 10009

ALEJANDRINA VARGAS

Pro Se Plaintiff

51 Coursen Place Apt. 2C

App. 27B

Staten Island, NY 10304

ROGERS, WUGHALTER, KAUFMAN & CORREDINE,

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Bronx, NY 10451

Defendants Eric Wughalter, Esq. and Rogers,

Wughalter, Kaufman & Corredine, Esqs.

Appearing pro se

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Management LLC, Stanley Wasserman, 2727 Realty

LLC

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Diane Marie Pietraszewski, Esq.

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App. 28B

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and SG2 Management, LLC

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Attorneys for defendant City Marshal Thomas J. Bia

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Corporation Counsel of the City of New York

By: Michael A. Suarez, Esq.

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App. 29B

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Attorney General of the State of New York

By: Charles Sanders, Esq.

Assistant Attorney General

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New York, NY 10271

App. 30C

UNITED STATES DISTRICT COURT (USDC SDNY)

SOUTHERN DISTRICT OF NEW YORK Document

Hector Vargas, Electronically filed

Plaintiff, Dated filed 10/24/06

05 Civil 9992 (PKC)

- against - JUDGMENT

Service Employees International Union

Local Union No. 32B - 32J, and 2727

Realty, LLC,

Defendants,

Whereas the above-captioned action having come before this Court, and the matter having come before the Honorable P. Kevin Castel, United States District Judge, and the Court, on October 23, 2006, having rendered its Memorandum and Order granting summary Judgment in favor of defendants and denying all other

relief sought by either party, it is, ORDERED, ADJUDGED AND DECREED: That for the reasons stated in the Court's Memorandum and Order Dated October 23, 2006, Summary Judgment is granted in favor of defendants and all other relief sought by either party is denied.

Dated: New York, New York

October 24, 2006 J. Michael McMahon

_____

Clerk of Court

By: "s/"

_____

Deputy Clerk

This Document was Entered 10/24/06

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Hector Vargas,

Plaintiff. 05 Civ. 9992 (PKC)

- against -

MEMORANDUM

AND ORDER

Service Employees International

Union Local Union No. 32B-32J, and

2727 Realty, LLC,

Defendants.

P. KEVIN CASTEL, DISTRICT Judge:

Plaintiff Hector Vargas brings this action against his former employer, 2727 Realty, LLC ("Employer"), and his union, Service Employees International Union Local Union No. 32B-32J ("Union"), seeking

compensatory and punitive damages, reinstatement to his position as a superintendent with back pay, costs and attorney's fees and an injunction. Underlying Vargas's claims is his contention that he was wrongfully terminated from his position as superintendent for engaging in union activities and that he was wrongfully ejected from a basement "party/storage space" that he claims to have occupied with the consent of the defendant-Employer, Plaintiff's claims have been the subject of an arbitration, in which he was represented by his present counsel. The arbitrator found the Employer's termination of plaintiff's employment to have been for "just" cause". The Employer also prevailed in an action it brought in New York City Civil Court to eject plaintiff from the party/storage space. Plaintiff also brought an unfair labor charge against his Union before the National Labor Relations Board which was

"deferred" by reason of the arbitration. Plaintiff has appealed unsuccessfully within the NLRB.

Plaintiff contends that the arbitration award should be "reversed" as the arbitrator's decision was "arbitrary, capricious, an abuse of discretion, not in accordance with law, exceeds his authority under the collective bargaining agreement, was corrupt, fraudulent and partial and without due process of law." (Amended Verified Petitioned at Par. 18) Defendants rely upon the general principal that only the union, and not a union member, is a party to an arbitration conducted pursuant to a collective bargaining agreement and that only the union has standing to challenge an arbitration award. Relying upon a well-defined exception to that rule, Vargas asserts that his Union breached its duty of fair representation and, for that reason, he may step into the shoes of the Union and assert his claims.

The defendant Union moves for summary judgment asserting that there is no genuine dispute of material fact surrounding its discharge of its duty of fair representation and that it is entitled to summary judgment in its favor. Examining all submitted pleadings, affidavits and exhibits, in a light most favorable to plaintiff, I conclude that no reasonable fact-finder could conclude that the Union has breached its duty of fair representation. Defendants are entitled to summary judgment in their favor.

Proceedings in this court

This case was originally commenced in Supreme Court, Bronx County, and removed to this court on November 28, 2005. This court has jurisdiction over the subject matter of this action pursuant to section 301(a) of the Labor Management Relations Act ("LMRA"), 29 U. S. C. § 185 (A).

On February 24, 2006, I issued an order granting plaintiff leave to file an amended pleading and directing that any additional motions to amend be filed within 15 days. Plaintiff filed an Amended Verified Petition ("AVP") on March 10, 2006. On April 17, 2006, plaintiff requested permission to further amend the pleadings. Despite the untimeliness of the request, I waive the pre-motion conference requirement and permitted plaintiff to file a motion to amend. (Docket #18) No motion to amend was thereafter filed by plaintiff. However, a Second Amended Verified Petition was submitted to Chambers. There has been no "good cause" shown as to why there was not compliance with my April 17 order. As I advised the parties prior to the filing of the summary judgment motion, the Second Amended Verified Petition is not an operative pleading in this case and I do not consider it in determining this motion. (See 5/12/06 Tr. At 15-16)

On June 23, 2006, defendants filed this motion for summary judgment addressed to the Amended Verified Petition. On October 16, 2006, I issued an order directing the defendants to submit the complete record of proceedings before the New York Civil Court relating to plaintiff's claims in this action, as well as a chronology of the actions before the Civil Court. I also invited plaintiff to submit any additional materials for my consideration by noon on October 23, 2006. Defendants' submissions were received while nothing was submitted by plaintiff

Background

Plaintiff was the building superintendent at 2727 University Avenue, Bronx, New York, until his dismissed on December 28, 2004. (AVP at ¶ 3) The Union represents the service workers in the building where Vargas worked and lived. (AVP at ¶ 5) On December 28, 2004, an agent of the defendant Employer

delivered to plaintiff a letter of termination of employment. The stated ground for the termination of plaintiff's employment was that Vargas had an "illegal apartment set up in [a] basement storage room". (AVP Exh B) as part of his employment, Vargas was permitted to occupy the basement superintendent's apartment. (AVP ¶ 21) According to Vargas, the Employer asserted that he was illegally occupying a party/storage space in addition to the apartment. (AVP at ¶ 16) Vargas alleges that his employer was "on actual and constructive notice" of his occupation of the party/storage space and that the stated reason for his termination was a "sham pretest". (AVP at ¶ 22) Vargas asserts that the stated reason was pretestual and that, in fact, he was fired because he requested a snowblower, provision of which plaintiff alleges was required under the collective bargaining agreement. (AVP at ¶ 10, 13, 27; AVP Exh. A) While there is a dispute

as to which collective bargaining agreement was operative at the time plaintiff's claims arose and were adjudicated, it is undisputed that the most recent agreement between the Union and Employer was signed in March 2005. It is this March 2005 agreement which provided that Vargas's claims concerning the termination of his employment would be submitted to arbitration before Arbitrator Robert Herzog. Vargas terms the March 2005 agreement the "secret settlement" or "secret memorandum". (AVP at ¶ 14) Prior to execution of the March agreement, the Union had filed an affair labor practice charge before the National Labor Relations Board on plaintiff's behalf against the Employer and S. W. Management LLC. (Vargas Aff. At ¶ 8) Under the terms of the March 2005 agreement, this charge was withdrawn and submitted to arbitration before Arbitrator Robert Herzog. Vargas complains of the outcome and circumstances of that arbitration.

Arbitrator Robert Herzog conducted two days of hearings on the claims of Vargas, May 19, 2005 and July 1, 2005. Although the arbitration was conducted pursuant to a collective bargaining agreement between the Union and Employer, plaintiff chose to be represented by his own counsel, Morris Markowitz, Esq. Prior to arbitration, plaintiff alleges that, despite their objections, both he and Mr. Markowitz were "coerced" into signing a written waiver.*1 (Plaintiff's Resp. to Rule 56.1 at ¶ 29) The waiver document states that as a result of his choice to be represented by private counsel rather than the Union, plaintiff waived any claims that he might have against the Union arising out of the arbitration. (Sparer Aff. Exh. 21) It was executed by Vargas, Mr. Markowitz and a representative of the Union. At the arbitration hearing, plaintiff introduced testimony from two building residents, Ms. Dolores Nuñez and Mr. Mandelbaum, and his union

representative, Mr. Colin Forehand. (See Vargas Dep. 91-94, 180-182; Plaintiff's Resp. to 56.1 at ¶ 34)

In a thirteen page opinion and award, Arbitrator Herzog found that there was "just cause" for the Employer's termination of Vargas's employment. He found that Vargas's testimony was not credible and was contradicted by his own witness. (See AVP Exh. A at 10-12 Nevertheless, Arbitrator Herzog granted Vargas back pay and moving expenses pursuant to the CBA

The New York civil Court Proceedings

On December 29, 2004, the day after terminating plaintiff's employment, Employer had filed a petition in

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*[1] *Plaintiff further claims that "a copy of the wrong incorrect waiver that did not bare any signatory to the waiver and is in direct conflict and is different from waiver presented" at Sparer Exh. 21 was used by the arbitrator in writing his opinion. (Plaintiff's Resp. to Rule 56.1 at ¶ 29).*

New York City Civil Court proceedings On December 29, 2004, the day after terminating plaintiff's employment, Employer had filed a petition New York City Civil seeking eviction of Vargas from the superintendent's apartment. On January 28, 2005, Employer filed a second action in New York City Civil Court seeking Vargas's ejection from a second basement space (referred to by plaintiff in the AVP as the "party/storage space"). On March 7, 2005, a hearing was held on both matters before the Honorable Brenda S. Spears. Pursuant to the March 2005 agreement signed by the Union and Employer, Vargas's eviction from the superintendent's apartment was held in abeyance pending the outcome of the arbitration described above. On November 7, 2005, three months after the issuance of the arbitration decision adverse to Vargas, Employer filed a motion for summary judgment for possession of the superintendent's apartment. Vargas opposed this

motion and on February 24, 2006, the parties agreed to a stipulation of adjournment, permitting Vargas to remain in the superintendent's apartment pending the outcome of the motion pending before this court. As to the action seeking the ejectment of Vargas from the party/storage space, Judge Spears held a hearing at which she heard sworn testimony from both Vargas and Employer's agent Tom Tucker as to the circumstances surrounding Vargas's use of the part/storage space. Judge Spears found adversely to plaintiff, stating that, "I cannot allow you to stay in space that's clearly in violation of the building code. This is not an apartment intended to be used for anything, other than a storage facility...It's dangerous." (Sparer Aff. Exh 19) Vargas's appeal of the ejectment order was denied by the Appellate Term on September 22, 2006.

The National Labor Relations Board Proceedings

On January 10, 2005, prior to the arbitration, plaintiff filed an unfair labor practices claim before the National Labor Relations Board ("NLRB"). On July 7, 2005, plaintiff's charge was deferred by Region 2 of the NLRB pending the outcome of the arbitration. (See Sparer Exh. 7) Vargas twice appealed the NLRB's deferral decision but was denied on both occasions. (See Sparer aff. Exh 9, 10) In denying plaintiff's request that his claim be heard despite the arbitration proceeding, the NLRB concluded that the arbitration proceedings "were fair and regular and all parties agreed to be bound by the results of arbitration...that the Union was unsuccessful in prevailing at arbitration was not deemed to be evidence that the Employer and Union sought to discriminate against you." (Spare Aff. Exh 10)

Finally, on February 23, 2006, six months after the arbitration award by Arbitrator Herzog, the NLRB

Regional office wrote to plaintiff, dismissing his grievance and stating that "the Broad's standards for deferral to an arbitration award have been satisfied...it appears from the investigation that the arbitration proceeding was fair and regular..." (See Sparer Aff. Exh. 12)

II. Summary Judgment Standard

Summary judgment "shall be rendered forthwith if the pleadings, deposition, answers to interrogatories, and admissions on file, together with the affidavits. If any show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). It is the initial burden of a movant on a summary judgment motion to come forward with evidence on each material element of his claim or defense, demonstrating that he or she is entitled to relief. A fact

is material if it" might affect the outcome of the suit under the governing law..." Anderson v. Liberty Lobby, Inc. 477 U. S. 242, 248 (1986). The evidence on each material element must be sufficient to entitle the movant to relief in its favor as a matter of law, Vt. Teddy Bear Co., Inc., v. 1-800 Beargram Co., 373 F. 3d 241, 244 (2d Cir. 2004).

When the moving party has met this initial burden and has asserted facts to demonstrate that the non-moving party's claim cannot be sustained, the opposing party must "set forth specific facts showing that there is a genuine issue for trial," and cannot rest on "mere allegations or denials" of the facts asserted by the movant. Fed. R. Civ. P. 56(e). In raising a triable issue of fact, the non-movant carries only "a limited burden of production," but nevertheless "must 'demonstrate more than some metaphysical doubt as to the material facts,' and come forward with 'specific

facts showing that there is a genuine issue for trial.'" Powell v. Nat'l Bd. Of Med. Exam'rs, 364, F. 3d 79, 84 (2d Cir. 2004) (quoting Aslandis v. U. S. Lines, Inc., 477 U. S. 242, 252 (1986)).

An issue of fact is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson, 477 U. S. at 248. The Court must "view the evidence in the light most favorable to the non-moving party and draw all reasonable inferences in its favor, and may grant summary judgment only when no reasonable trier of fact could find in favor of the nonmoving party." Allen v. Coughlin, 64 F. 3d 77, 79 (2d Cir. 1995) (quotations and citations omitted); accord Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U. S. 574, 587-88 (1986). In reviewing a motion for summary judgment, the court must scrutinize the record, and grant or deny summary judgment as the record warrants. Fed. R. Civ.

P. 56(c). In the absence of any disputed material fact, summary judgment is appropriate. Id. Mere "conclusory statements, conjecture, or speculation by the party resisting the motion will not defeat summary judgment." Kulak v. City of New York, 88 F. 3d 63, 71 (2d Cir. 1996) (citing Matsushita Elec. Indus. Co., 475 U. S. at 587 (1986)). See also Anderson, 477 U. S. at 249-50 (noting that summary judgment should be granted if the evidence is "merely colorable" or "not significantly probative").

III Discussion

Defendants assert that the arbitration award bars plaintiff's claims and that plaintiff lacks standing to challenge the arbitration award. "[A]n individual employee represented by a union generally does not have standing to challenge an arbitration proceeding to which the union and the employer were the only parties." Katir v. Columbia Univ., 15 F. 3d 23, 24 (2d

Cir. 1994). Vargas does not contend that he was a party to the arbitration agreement. However, a plaintiff may bring suit under section 301 of the Labor Relation's Management Act where the plaintiff can demonstrate that there has been a breach of the duty of fair representation on the part of the union. Id. At 24-25. Underlying this exception is the notion that a claim brought under section 301 is effectively two claims, one against the employer for violation of section 301 and one against the union for breach of duty of fair representation. As such, to establish a hybrid section 301/duty of fair representation claim, a plaintiff must make the dual showing that (1) the employer breached a collective bargaining agreement; and (2) the union breached its duty of fair representation to the union member. See DelCostello v. Int'l Bd. Of Teamsters, 462 U. S. 151, 164-65 (1983). Because the two claims against the employer and union are "inextricably

interdependent." a plaintiff's ability to sue their employer is contingent on the threshold showing that the union breached its duty of fair representation. See United Parcel Serv., Inc. v. Mitchell, 451, U. S. 56, 62 (1981) (Stating that an "indispensable predicate" of a section 301 action is a "demonstration that the Union breached its duty of fair representation.")

To state a claim for relief on a hybrid section 301/duty of fair representation claim, the non-moving party is required to articulate specific facts demonstrating bad faith. discrimination or arbitrariness on the part of the union. See. White v. White Rose Food, 237 F. 3d 174. 179 (2d Cir. 2001) (citing Marquez v. Screen Actors Guild, Inc., 525 U. S. 33, 44 (1998)). "Conclusory allegations without specifying supporting facts to show a union's lack of good faith fail to state a valid claim. "Spielmann v. Anchor Freight Inc., 551 F. Supp. 817. 822 (S. D. N. Y. 1982). To

survive a motion for summary judgment, plaintiff must come forward with facts demonstrating a triable issue of fact as to whether the Union engaged in "fraudulent, deceitful, or dishonest action." Sim v. New York Mailers' Union No. 6, 166 F. 3d 465, 472 (2d Cir. 1999). "A union breaches its duty of fair representation if its actions 'can fairly be characterized as so far outside a wide range of reasonableness...that [they are] wholly arbitrary, discriminatory, or in bad-faith.'" Spellacy v. Airline Pilots Ass'n-Int'l, 156 F. 3d 120, 126 (2d Cir. 1998) (quoting Airline Pilots Ass'n Int'l v. O'Neill, 499 U. S. 65, 67 (1991); see also Marquez, 525 U. S. at 4 (citations omitted). Plaintiff does not contend that the Union's actions were discriminatory. He argues that the Union's actions were arbitrary and in bad faith. Viewing all of the evidence in a light most favorable to plaintiff, no reasonable fact-finder could conclude that the Union acted in bad faith or arbitrarily

and, thus, breached its duty of fair representation. The thrust of Mr. Vargas's lengthy and somewhat obscure pleading is the contention that the Union acted in bad faith by (1) failing to "ethically or zealously represent the Petitioner during the arbitration process and at other times" (Vargas Aff. At ¶ 40); (2) lying to the Civil Court about the presence of a CBA hereby prejudicing Vargas, (AVP at ¶ 59); (3) entering into a "secret settlement" agreement with the defendant Employer which compelled Mr. Vargas to "forfeit the right to remain in possession of the superintendent's apartment and waive his right to a stay of all ejectment proceedings..." (Vargas Aff. at ¶ 62), and (4) failing to ensure that the Arbitrator explicitly addressed both the unfair labor practices claim withdrawn from before the NLRB and the ejectment claims concerning the party space, (Plaintiff's Resp. to R. 56.1 at ¶ 9).

As to the assertion that the Union failed to adequately represent him at the arbitration, it was plaintiff's decision not to be represented by the Union during the course of the arbitration proceedings. (See AVP Exh. A at 4) Plaintiff alleges that prior to May 19 arbitration session, plaintiff and his attorney, Mr. Markowitz, were "coerced" into signing a waiver presented by the union. The written waiver recites that plaintiff agreed to waive any claim he might have against the Union "in connection with their obligation to represent me in this arbitration proceeding". (See AVP Exh. A at 4) No threatened use of force is claimed. No threat of withholding an entitlement is asserted. No improper benefit was offered. The Claim of Coercion is entirely conclusory and is insufficient to raise a triable issue of fact. The undisputed fact remains that Vargas selected private counsel to represent him at the arbitration who appeared and acted on his behalf.

Plaintiff next contends that the Union lied about the existence of any CBA, including the March 2005 agreement, to the Civil Court hearing the ejectment proceeding and failed to represent plaintiff in that proceeding. (See plaintiff's Resp. to 56.1 at ¶ 24). "the agreement entered into between union local 32BJ and the alleged employer 2727 Realty LLC was a secret one which...was not told to the Bronx Housing Court on March 7, 2005, to the great prejudice of Mr. Vargas."; Id. at ¶ 10. "Union Local 32BJ and its attorneys along with Mr. Vargas alleged employer 2727 Realty LLC and their attorneys knowingly acted in a joint corrupt, collusion matrimony and withheld information to the NLRB and this court and all other courts...").

In support of his allegations that the Union lied to the Civil Court about the existence of a CBA, Vargas alleges that a letter was written from the Union

to the New York City Civil Court on February 16, 2005 both denying that any CBA existed and stating that the Union would therefore not represent Vargas in the ejectment proceeding. (AVP at ¶ 57) Vargas claims that this is evidence of an act of plaintiff's claims is his belief that a CBA was in effect either at the time of his firing on December 27, 2005 or at the time that the Union wrote to the Civil Court in February 2005.

The presence, or absence, of a collective bargaining agreement determines the rights and obligations that all parties have both to and against each other. Plaintiff contends that a collective bargaining agreement signed in June 1998 was effective at the time his claims arose by virtue of an automatic renewal provision contained in that agreement. Plaintiff alleges that as the June 1998 CBA was never terminated, it renews automatically on a year-to-year basis and that any subsequent CBAs are "illegal" or not effective.

Defendants, however, contend that there have been several superseding CBAs signed in January 1999 and March 2005. The January 1999 CBA took the form of a memorandum of understanding which was signed by the plaintiff.[2] Although the document on its face states that it is a CBA. Vargas does not view the January 1999 agreement as a CBA, stating that "it was two pieces of paper that was not honor. was not honor and two pieces of papers that did not alter the contract, but the arbitrated award. that's all" (Vargas Dep. at 52/16-21) The January 1999 agreement contained incorporated terms from a CBA signed between the Union and Employer in 1995 but specifically excluded any inconsistent terms from any prior CBA.[3]

Critically, the January 1999 agreement was a fixed-term agreement expiring on June 30, 2001, and did not contain, or incorporate, any automatic renewal provision. Although it is admittedly confusing that the

January 1999 agreement makes no reference to the June 1998 CBA, it remains the fact that the January 1999 CBA expired June 30, 2001. It, therefore, appears that there was no CBA in effect between June 30, 2001 and March 2005. Further, the agreement which was signed between the Union and Employer in March 2005 was not effective until March 1, 2005. As such, when the Union wrote to the court on February 16, 2005 stating that there was no CBA in effect, the statement was accurate.

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[3]*While plaintiff asserts that he signed the January 1999 CBA "u. p." (under protest) which was somehow eliminated from the document so only signature appear", Vargas Aff. At page 9, plaintiff does not contest the terms contained in the document or that he did sign a version of the agreement which is substantively the same. (Vargas Dep. Pp. 55-61).*

[4]*The 1995 agreement was not submitted by either party 2006.*

Moreover, counsel did not lie to the court during the hearing held on March 7 about the presence of a CBA. When Vargas appeared in Civil Court on March 7, 2005, counsel for the Employer explicitly stated to the court that the proceeding relating to the superintendent's Apartment was "in binding arbitration" pursuant to agreement of the parties. (See Sparer Aff. Exh. 19 at 3/6-22) While not explicitly referring to the agreement by name or as a CBA, there is no evidence to indicate that counsel for the Employer hid the presence of an agreement from the court. The Union did not represent Vargas at these proceedings because, as Vargas concedes, the Civil Court found that the ejectment claim was a "non-union" issue.*4 Furthermore, as a practical matter, any statements made to the Civil Court would only be attributable only to Employer and not the Union. See Sim, 166 F.3d at 472 ("[E] stablishing that the union's actions were sufficiently

'arbitrary, discriminatory or in bad faith' is only the first step toward proving a fair representation claim. Plaintiffs must then demonstrate a causal connection a causal connection between the union's wrongful conduct and their injuries...") (quoting Spallacy, 156 F.3d at 126). Plaintiff also points to the very creation of the March 2005 agreement. Vargas alleges that the Union acted in bad faith by entering an "illegal" agreement which was "signed in great prejudice of Mr. Vargas and without his knowledge or consent". (See Plaintiff's Mem. In Opp. At 8) Plaintiff's specific allegations of bad faith and arbitrariness concerning the execution of the March 2005 agreement seem to be that he neither approved it nor was he informed of its existence until arbitration commenced. (See Plaintiff's Mem in Opp. At 19, 21). Vargas's assertion that because he was not a party to the March 2005 agreement, it was "deceitful

and dishonest and violated my [Vargas'] due process rights" is without basis in fact or law, (See Vargas' Aff at ¶ 9) As a threshold matter, the Union was not required to involve Vargas in the process of negotiating

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*4Plaintiff cites to "trial transcript, page 55, lines 11-25" and goes on to state that he is "now submitting the entire trial transcript of said case under index no. 9849/05" but fails to do so. On October 16, 2006, I requested that Employer's counsel submit the record of the proceedings before the Civil Court in an effort to clarify plaintiff's claims before this court. Employer's submissions indicate that in prior proceedings held before Judge Mitchell Danzinger, the Union entered an initial appearance on plaintiff's behalf but then requested to withdraw as counsel. The request was consented to by both sides and Judge Danzinger's order permitted the Union to withdraw from the ejectment proceedings. (See Siebel Aff. Exh. A at 5-6) The case was then transferred to Judge Spears for a trial where Judge Spears stated that the "collective bargaining agreement is not part of this [the ejectment] case". (See Siebel Aff. Exh. A *at 55) As the ejectment was a non-union issue, the Union was not required under any CBA to represent Vargas.*

A CBA. See 29 U. S. C. § 159(a) (1970) (union is the exclusive bargaining agent of its members for purposes of collective bargaining agreements). While a union's exclusive bargaining power requires that it act fairly and not in breach of its duty of fair representation. "[f]ederal labor law does not require rank - and - file ratification of employer - union agreement." White, 237 F. 3d at 182. Further, the Supreme Court has noted that review of a union's decisions during collective bargaining must be conducted through a deferential lens. See O'Neill, 499 U. S. at 78 ("Any substantive examination of a union's performance of their bargaining responsibilities."). In examining whether a union's actions are in bad faith or arbitrary, courts "evaluat[e] the rationality of a union's decision in light of both the facts and the legal climate that confronted the negotiators at the time the decision was made..." Id.

Here, plaintiff has failed to come forward with any evidence that the March 2005 agreement was executed in bad faith or that the Union acted arbitrarily in their negotiations. Rather than disadvantaging plaintiff, the March 2005 agreement objectively benefits plaintiff. The agreement allows plaintiff to reside in the superintendent's apartment pending outcome of any arbitration proceeding. In fact, plaintiff continues to "occupy as an employee part of the premises as living quarters" pending the outcome of this action. (Vargas Aff. At ¶ 18) It additionally provides plaintiff with a new CBA containing wage and pension increases. Further, it complies with the NLRB's policy of encouraging arbitration of claims. See United Techs. Corp., 268 NLRB 557, 558 (1984). Plaintiff alleges that the March 2005 agreement works to his detriment as he is required to "forfeit the superintendent's apartment" while the arbitration was pending. (Vargas Aff. At ¶ 62)

The text of the March agreement. However, explicitly states that the "eviction case commenced by the employer presenting pending in Civil Court Bronx County...will be Stayed pending the outcome of the arbitration". (AVP Exh. E).

Moreover, plaintiff's assertion that he was not made aware of the agreement until May 19, 2005 is immaterial. As a factual matter, it appears that plaintiff was made aware of some arbitration agreement at the Civil Court proceedings on March 7, 2005 (See Sparer Aff. Exh. 19) Even assuming that plaintiff was not made aware of the agreement until arbitration, it is immaterial since, as discussed above, the March 2005, agreement did not in any way prejudice plaintiff at the arbitration. While plaintiff's counsel may wish that he had sooner received the agreement, that alone does not constitute bad faith nor is it the cause of any injury to Vargas. Finally, plaintiff asserts that as a result of the

March 2005 agreement and acts of deception by the Union, less than all of his claims were submitted to the arbitrator. (See Plaintiff's Aff. Page 9) The March 2005 agreement did not implicitly or explicitly limit the claims that plaintiff could assert before the arbitrator. Plaintiff's contention that he was not permitted to submit to the arbitrator the claim asserted before the NLRB is contradicted by his own deposition testimony. At his deposition, plaintiff was asked "Did Mr. Markowitz make the argument to the arbitrator that you were fired for union activity?" to which plaintiff responded, "Mr. Markowitz presented all the evidence and all the things that was related for my illegal and unjust firing". (See Vargas Dep. At 172-73) Further, plaintiff does not contest defendants' Rule 56.1 statement that evidence of wrongful discharge for union activity was presented at arbitration but rather acknowledges that "point 26 in the defendants' joint

statement, it is true..." and continues to assert that Arbitrator Herzog did not properly, or more aptly favorably, consider plaintiff's argument. (See Plaintiff's Resp. to 56.1 at page 32) While plaintiff also asserts that he was unable to present his claim for ejectment from the party/storage space to the arbitrator, those claims were adjudicated by the Civil Court.

Conclusion

Drawing all inferences in favor of the non-movant, no reasonable fact-finder could conclude, on the evidence of record on this motion, that the defendant Union breached the duty of fair representation. A breach of duty of fair representation is a threshold requirement to maintenance of a cause of action against a union and employer under section 301. Summary Judgment is Granted in favor of defendants. **All other relief sought by either party is denied.**

The Clerk shall enter judgment in favor of defendants. SO ORDERED.

Dated: New York, N. Y "/s/"_____

October 23, 2006 P. Kevin Castel

United State District Judge

App. 67D

Case No. 2 CA - 36730 County of New York

State of New York

AFFIDAVIT

I, Calvin Forehand, being duly sworn upon my oath, hereby state as follows: I have been given assurance by an agent of the National Labor Relations Board that this affidavit will be considered confidential by the United States government and will not be disclosed unless it becomes necessary for the government to produce it in connection with a formal proceeding. My Address is: 101 Avenue of the Americas, New York, NY 10013 My Phone Number is: (212) 388 - 3593.

1) I am currently employed by Local 32BJ, SEIU, AFL-CIO (Union) as a Union Delegate since September 11, 2001. My responsibilities as a Union Delegate include enforcing the contract, representing the members, answer questions for members and processing their

grievances. The Union took over shops that were represented previously by Local 32E, SEIU, including the one at 2727 Realty LLC and S. W. Management, LLC, 2000. Until recently, there was only one Union member working for the Employer, Hector Vargas. The collective bargaining agreement covering Vargas' terms and conditions of employment expired in 2002. There has been no new agreement reached, but the Employers have been complying with the provisions in the expired agreement. The expired agreement has a provision in it that states that Vargas is supposed to be provided with a snow blower.

2. On or about December 27, 2004, I received phone call from Hector Vargas. Superintendent of the Employer's facility. Vargas said that the snow blower he had been asking for since last year was still not provided to him. He said that he needed a snow blower

and asked if I could call the Employer and ask about the snow blower. I told Vargas that I would talk to a manager and see what I could do.

3. Right after I got off the phone with Vargas, I called Tom Torres, Managing Agent. I talked with Torres about the snow blower, and he referred me to Martin Blum, CEO of S. W. Management. S. W. Management is the company that manages the 2727 building. Torres then put Blum on the line. I asked him for a snow blower for Vargas. Blum said that there was really no snow on the ground right now. I questioned what would happen tomorrow, or the next day when it snowed. Blum said that Vargas should go to another

4. building and borrow a snow blower from another superintendent. I asked Blum why he couldn't have the snow blower delivered to Vargas at his building. Blum

then said that I should tell Vargas that he's fired. This entire conversation was held over speakerphone. Eddie Feliciano, Union Delegate, was in the room with me during this conversation. I said to Blum that I was not telling Vargas that he was fired. I told him that if he wanted to fire Vargas, he should write it up and fire him. I also asked him if he knew what he was doing constituted an Unfair Labor Practice. Feliciano then announced over the phone line that he heard everything that Blum just said. Blum hung up the phone after Feliciano said that he heard what Blum said.

5. The following day, Vargas called me and said that he had been fired. Vargas said that he had been given a termination letter. I asked him to Fax it to me and to come meet with me in my office. The letter stated the Vargas was terminated because if was discovered by management that his mother was living in

the basement. Vargas explained that his mother had been living in the basement for years, and that there was never a problem. He mentioned that members of management had spoken with her in the past and that there was never a problem. To the best of my knowledge, Vargas never received any discipline or warnings concerning his work performance or the fact that his mother was living in the basement.

6. The Union has filed a grievance on behalf of Mr. Vargas, however, due to the fact that the contract has expired, we cannot take the matter to arbitration. I have read this statement consisting of 3 pages, including this page. I fully understand its contents, and I certify that it is true and correct to the best of my knowledge and belief.

"/s/"

Calvin Forehand

Subscribe and sworn to before me on this 25th day of January 2005

"/s/"

Helena A. Fiorianti

Board Agent

Nation Labor Relations Board

App. 73E

SG2 MANAGEMENT

975 Walton Avenue, Suite 1000

Bronx, NY 10452

Phone: (718) 293 - 6850

Facsimile: (718) 293 - 6851

Date: January 30th, 2009

Re: Maria Suero

2727 University Avenue Bsmt.

Bronx, NY, 10468

Dear Maria Suero

This is to serve notice that this office has offered you numerous apartments throughout our portfolio and you have refused them. This office informed you November 17, 2008 that the apartment you are currently dwelling in is an illegal unit and we must relocate you to a legal unit permanently.

This office has gone through great lengths to assist you but regret not being able to help you find an apartment of your liking. At this time we are forced to inform you that you must vacate this unit as soon as possible. We are dealing with summons caused by your illegal occupancy in this basement unit.

We need your cooperation in this matter. A legal proceeding against you will take place if this matter is not resolved immediately.

Sincerely,

Evelyn DeJesus

Management office

Cc: Tenant file

Hand deliver

Certified mail

CIVIL COURT OF THE CITY OF NEW YORK

COUNT OF BRONX: PART 52

---------- Index L & T 9848/05

2727 Realty LLC,

Petitioner, DECISION AND ORDER

- against - Present:

Hector Vargas, Hon. Julia I. Rodriguez

Respondent. Judge, Civil Court

Recitation, as required by CPLR 2219(a), of the papers Considered in review of petitioner's motion for summary Judgment and to vacate Jury Demand:

Paper	Numbered
Order to show Cause, Affirmation & Exhibits	1
Defendant's Affiamation in Opposition & Exhibits	2
Plaintiff's Reply	3

Petitioner commenced this proceeding to recover possession of the subject premises on the ground that respondent's rights to occupancy expired upon "the superintendent's release from employment" [¶ 4 of Petition]. Respondent interposed an Answer alleging various defenses, including the claim that he could not be discharged from employment and/or evicted without a finding of good cause pursuant to his Union Contract [¶ 7 of Answer).

Thereafter, the eviction proceeding was stayed pending the results of an arbitration proceeding at the National Labor Relations Board (the "Board"). Pursuant to the Opinion and Award dated August 15, 2005, the Arbitrator sustained respondent's discharge of employment finding "good cause" for the termination. Respondent appealed the Arbitrator's findings and the Appeal was denied by the Board on August 22, 2005.

Respondent also commenced an action in Supreme Court Bronx County against petitioner (his former employer) and the Union,[1] seeking to reverse the Arbitrator's ruling against him; respondent alleged *inter alia* that the Arbitration Award was rendered arbitrarily and beyond the scope of the collective bargaining agreement, and that the Union breached its duty of fair representation. The Supreme Court action was transferred to federal court in November 2005, and consequently, the U. S. District Court of the Southern District of New York entertained respondent's claims. Respondent's Union moved for summary judgment asserting *inter alia* that the Arbitration Award barred respondent's claims, and that respondent lacked standing to challenge the Award. After a lengthy discussion of the facts and a thorough review of the law, on October 23, 2006 the District Court issued a 16 - page Memorandum and

Order granting summary judgment in favor of the Union and against respondent.

ISSUES BEFORE THIS COURT:

In November 2006 petitioner moved for a second time to restore the eviction proceeding to the trial calendar and for summary judgment in its favor. In response, respondent served a Jury Demand which triggered the transfer of the eviction proceeding from the Housing Part 52 of the Civil Court. In addition, respondent opposes summary judgment asserting that his Answer raises issues of fact requiring a trial.

As an initial matter, on March 7, 2005 the parties agreed to be bound by Arbitration and to "incorporate [the] arbitration into a judgment." It is axiomatic that such an agreement bars a claim to a jury

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[1]*Service Employees International Union Local Union No. 32B-32J*

trial. In any event, after consideration of respondent's Answer and affidavit dated December 15, 2006, the court finds that respondent fails to raise an issue of fact requiring a trial. All of defendant's allegations and defenses have already been entertained either at the Board and/or in Federal Court, and respondent did not prevail. Respondent's claim that this court's lacks jurisdiction is simply misplaced and inaccurate.

The issue in this proceeding (which was first calendared in February 2005) is whether petitioner may be awarded possession of the subject premises. The court finds that petitioner's submission established that respondent's possession of the premises was permissible solely as an incident to his employment as the building superintendent, that respondent's termination was upheld by the Board, and that upon respondent's termination of employment his rights to possession expired as a matter of law. Respondent's allegation concerning the

apartment's value or lack thereof, and that his apartment and his sister's (Aunt's) apartment are illegal, do not raise issues of fact to defeat summary judgment in this holdover concerning rights to possession incidental to employment.

For the foregoing reasons, that branch of petitioner's motion to vacate the Jury Demand is **granted**, and that branch of petitioner's motion seeking summary judgment is also **granted,** and therefore it is ORDERED that petitioner is awarded a judgment of possession; issuance of the warrant forthwith and execution of the warrant is also forthwith.

That branch of petitioner's motion seeking a money judgment for use and occupancy is **denied** with leave to renew in a plenary action, as said claim for market value U & (is not substantiated.

"/s/"

Dated: Jan. 16, 2007

Julia I. Rodriguez

Judge, Civil Court

Transcription For: Mr. Hector Vargas

Description: Vargas v. Wughalters Oral Argument

09 - 3764 - cv

Date Recorded: May 25, 2010, at 10:00 a.m.

Date Transcribed: August 03, 2010

Media: CD

Length: 5 Minutes

Sound Quality: Fair

JUDGE: We're going to take the matter under advisement. Next we'll hear from the parties in Vargas versus Wughalter, 2727 Realty. Mr. Vargas we'll hear from you first.

MR. VARGAS: Good morning Your Honor. I'm Mr., Mr. Mr. Vargas, uh, Hector Vargas. I'm a pro se in this case. And what really is the issue is the vindication

of the supreme authority of the federal law. Judge Castel did not remand the case back to the supreme court that was removed by, uh, my alleged employer, 2727 Realty.

Um, once that case is removed on 28 U. S. C. Section 1446(e) states, I quote, promptly after the filing of such petition and bond the defendants or defendants shall give written notice therefore of all [UNITEL] body and shall file a copy of the petition with the clerk of such state court, which shall effect the removal and the state court shall proceed no further unless and until the case is remanded.

The Honorable Judge Federal District Court, Judge Castel, did not remand the case back to the Bronx Supreme Court where it was originally stayed from the [BRONX HOUSING?]. So then if the court did not remand it the state has no jurisdiction to proceed over the head of the federal court law that says

it has to remanded. And it wasn't remanded and you can see that on District Court Judge Leo Glasser that says it's the law of the State of New York that the case must be remanded and confirmed in the Bronx Supreme Court which never took place.

So if that happened then the Bronx Housing had no authority to go over the head of a federal, uh, Judge Castel decision and make a, a summary judgment to evict Mr. Vargas and his family from his apartment Julia Rodriguez, then what it did...acted over the protest of Mr. Vargas and his then attorney Morris Markowitz which became deceased. In a clear absence of any jurisdiction to act upon Julia Rodriguez is not immune also from the civil damage for acts made when she had no ju-, judicial capacity. And we have the case of Stump versus Parkman, 435 U. S. 349 of 1978 and Pierson versus Ray of 386 U. S. 547, 1967.

If the plaintiff verified complaint has not alleged a sufficient fact according to the defendants to make uh, out his cause of action. This court has to decide whether to grant the plaintiff the right to file in an amended, uh, complaint to add additional facts concerning the conspiracy. For example, the attorney for my alleged employers were actually state actors in that they were licensed to act as attorney by the office of the Court Administration, which is an arm of the State of New York.

Facts such as this can be supplemented to make my complaint more specific and, uh, plausible as part of my amended which I am requesting permission to do so from this court. In my letter to, uh, Judge Denny Chin on March 4th I indicated to him and in my brief, page 25 paragraph T, that there are two circumstances in which a judge is not immune from liability. The case, for instance, of Mireles versus Waco, 502 U. S. 9

(1991), where the court indicated at page 11 that first a judge is not immune from liability for non-judicial action - action not taken in the judge's judicial capacity. And then it cites the Forrester versus White, on 484 U. S. at 227 through 229. Then it cited the Stump versus Parkman which I previously cited.

And then it goes the second, uh, circumstances where a judge is not immune is through judicial nature taken in complete absence of all jurisdiction. Julia Rodriguez made her summary judgment over against me. She was acting in a clear absence of all jurisdiction, going over the heard of the already federal decision of, uh, Judge Castel, which is the authority in federal law. So the Bronx Housing, uh, court has no standing in going over the head of that situation.

The appended responding a claim in the Judge P. Castel decision and judgment of October 23 and 24,

was a final one to the plaintiff. But if it was a final decision for Mr. Vargas it should have been also a final one for the appellees' respondents who had no rights whatsoever to continue its action in the Bronx Housing Court which action had been stayed by the Bronx Supreme Court in the first instant. As for a New York City Marshall, Thomas Bia, when we had the conference with...before Ju-, uh, Judge, Federal Judge Chin, he asked a question to his attorney. If the eviction was defective on its face what should be done? And his answer was he should have not acted upon it. So he was in violation. It's a conspiracy to cause me harm to me and my family and brought then a false accusation which SG2 Management submitted a recently to my Aunt which was living in the basement with a lease indicating to her that her living there was an illegal, an illegal situation in violation of law which I and my family were put there by my two alleged employers.

JUDGE: Mr. Vargas you're now getting into many of the facts of the case, which is not the real issue before us. But in any event your time is up. Do you want to give us -

MR. VARGAS: [OVERLAPPING] Okay.

JUDGE: A concluding word?

MR. VARGAS [NO ?]

JUDGE: Okay. Thank you very much. We'll hear from your adversary.

MR. VARGAS: [OVERLAPPING] Okay.

MR. ROTHSCHILD: Good morning Your Honors. May it please the court. My name is Howard Rothschild. I'm here, here for the defendants 2727 Realty LLC, Tom Torres, Martin Blum, uh, Stanley Wasserman. Uh, this case really began in 2004 when Mr. Vargas, who was the superintendent of a small building in the Bronx, was

discharged. After that it really has a tortured history. [CLEAR THROAT] We've been to arbitration, uh, the NLRB several times in New York and, and Washington, Uh, charges brought by Mr. Vargas, uh, have been dismissed.

Uh, Mr. Vargas, uh, was fired for occupying a storage room in the basement despite the fact that the employer had given him a, an apartment, a legal apartment to occupy. Um, after that, um, the case, uh, uh, Mr. Vargas had, uh, uh, filed a article 75 and 78 action in New York Supreme Court. It was removed properly to federal court. Judge Castel dismissed the, uh, Mr. Vargas' actions. Mr. Vargas appealed that to this court. This court dismissed Mr. Vargas' actions. Mr. Vargas then filed for writ of certiorari at the United States Supreme Court, certiorari was denied.

After that Mr. Vargas started the action again. In the meantime, by the way, there was an ejectment

action because he was occupying a storage room which legally couldn't be occupied. There was an eviction action ultimately to get him out of his apartment. That's the...I believe that's the case involving, uh, the Housing court judge. Um, I'm not here on behalf of all of those other parties but, um, I understand there's generally judicial immunity, uh, for judges.

Um, and I just don't know where this is going to end because after the Supreme Court, um, certiorari, um, writ of certiorari was denied Mr. Vargas started this whole thing up again - um, the same common action, the same nucleus of facts and just bringing it against more defendants. Um, at this point we've asked that there be some sort of injunction issued that he can't continue to keep on filing these ca-, cases.

Judge Chin found that there was res judicata, uh, Mr. Vargas appealed that and here we are today. Um, if

you have any question, uh, I'd be happy to try to answer them Your Honors.

JUDGE: Thank you.

MR. ROTHSCHILD: Thank you

JUDGE: Alright, we'll take the matter under advisement. Thank you gentlemen. Thank you.

[END MEDIA]

CPLR § 7510. Confirmation of award

The court shall confirm an award upon application of a party made within one year after its delivery to him, unless the award is vacated or modified upon a ground specified in § 7511. **HISTORY**: Add, L 1962, ch 308, eff Sept 1, 1963. Earlier statutes: CPA § § 1458, 1461, 1463; CCP § § 2373, 2376; 2 RS 542, § § 9, 12.

Advisory committee notes: This section is substantially the same as CPA § § 1461 and 1463. It retains the former provision that the grounds for vacating or modifying an award may be urged in opposition to a motion to confirm although a motion based on such grounds is not then timely. Thus, a party is not compelled to move to vacate an award but may assert the alleged invalidity when the opposing party seeks to

confirm the award. Cf. § 203(c) (if a defense or counterclaim arises from the same transaction as the adversary's claim, it may be interposed to the extent of that claim notwithstanding that it could not be maintained at the time of the commencement of the action). The application to confirm, vacate or modify the award is interrelated and is therefore integrated under this article. If application to vacate or to modify an award is denied, the subsequent order will confirm it. Similarly, an order modifying an award will confirm it as modified without another application. See § 7511(c). See also Pirsig, Toward a Uniform Arbitration Act, 9 Arb J. (ns) 115, 117 (1954). Although judgment may not be entered directly upon an award that has not been confirmed, it may be enforced even after the time to confirm has expired by bringing an action on it unless the parties have agreed otherwise. See 21 Carmody-Wait, Cyclopedia of New York Practice 584-87 (1956).

Yet, because of the expeditions summary judgment provided by rule 3212, the latter manner of enforcement is no more burdensome than by confirmation. In order to avoid the anomaly, the limitation applicable to bringing an action to bringing an action has been shortened to one year. See § 215(5). Arbitration is urged as a quick method of disposing of disputes. There is no reason to permit suits on awards to be brought years after the award was made.

Multiple Dwelling Law of the State of New York § 301

§ 301 Certificate of compliance or occupancy

1. No multiple dwelling shall be occupied in whole or in part until the issuance of a certificate by the department that said dwelling conforms in all respects to the requirements of this chapter to the building code

and rules and to all other applicable law, except that no such certificate shall be required in the case of: a). Any class B multiple dwelling existing on April eighteenth, nineteen hundred twenty-nine, for which a certificate of occupancy was not required before such date and in which no changes or alterations have been made except incompliance with this chapter, and b). Any old - law tenement, or any class A multiple dwelling erected after April twelfth, nineteen hundred one, which was occupied for two years immediately before January first, nineteen hundred nine, and in which no changes or alterations have been made except in compliance with the tenement house law or this chapter, or wherein: (1) two or more apartments are combined creating larger residential units, and (2) the total legal number of families within the building is being decreased, and (3) the bulk of the buildings is not being increased. These exceptions shall not be deemed to relieve any owner from the obligation

to make every alteration required in any old - law tenement or other multiple dwelling in compliance with the applicable provisions of this chapter.

2. Except as above provided, no dwelling constructed as or altered or converted into a multiple dwelling after April eighteenth, nineteen hundred twenty-nine, shall be occupied in whole or in part until the issuance of a certificate of compliance or occupancy.

3. Such certificate shall be issued within ten days after written application therefore if the dwelling shall be entitled thereto. The department shall, on request of the owner or of his certified agent, issue a certificate of compliance or occupancy of any existing multiple dwelling not requiring such certificate, provided that, after an inspection by the department, no violations are

found against such dwelling.

4. The head of the department may, on the request of the owner or his certified agent, issue a temporary certificate of compliance or occupancy for a multiple dwelling or a section or a part thereof for a period of ninety days or less, provided that such certificate shall bear the endorsement that the dwelling has been inspected by the department and complies with all the requirements of this chapter, and that such temporary occupancy will not jeopardize life, health or property. Such temporary certificate may be renewed at the discretion of the head of the department for similar periods but shall not extend, together with such renewals, beyond a total period of two years from the date of its original issuance.

5. A certificate, a record in the department, or a statement signed by the head of the department that a certificate has been issued, may be relied upon by every person who in good faith purchases a multiple dwelling or who in good faith lends money upon the security of a mortgage covering such a dwelling. Whenever any person has so relied upon such a certificate, no claim that such dwelling had not, prior to the issuance of such certificate, conformed in all respects to the privisions of this chapter shall be made against such person or against the interest of such person in a multiple dwelling to which such a certificate applies or concerning which such a statement has been issued.

6. Notwithstanding any general or local law to the contrary, a certificate issued for any multiple dwelling organized pursuant to the provisions of article nine-B of the real property law, shall be deemed issued for each

dwelling unit contained within such multiple dwelling in full compliance with the requirements of this section.

HISTORY: Add, L 1929, ch 713; amd, L 1946, ch 950, eff April 22, 1946, with substance in part transferred from § § 14 and 302, sub 1 sub 1, par b, amd, L 1968, ch 893, eff June 22, 1968 Sub 1, par b, subpar (1), add, L 1968, ch 893 eff June 22, 1968 sub 1. par b, subpar (2), add, L 1968, ch 893 eff June 22, 1968 Sub 1, par b, subpar (3), add, L 1968, ch 893 eff June 22, 1968 sub 4, amd, L 1978, ch 509, § 4, L 1979, ch 131, § 1, eff May 24, 1979. Sub 6, add, L 1992, ch 406, § 2, eff July 17, 1992 (see 1992 note below).

§ 27-217 Administrative Code of the City of New York

§ 27-217 Change of occupancy or use. (a) No change shall be made in the occupancy or use of an existing building which is inconsistent with the last issued certificate of occupancy for such building, or which would bring it under some special provision of this Code or other applicable law or regulation unless a new certificate of occupancy is issued by the commissioner certifying that such building or part thereof conform to all of the applicable provisions of this code and all other applicable laws and regulations for the proposed new occupancy or use. (b) Except as provided by law, a new certificate of occupancy shall not be required where the change of use is within the same use group as listed in the amended zoning resolution. Where a building exceeds three stories in

height and the change does not exceed twenty per cent of the total floor area, an amendment to the existing certificate of occupancy for such new use shall be issued by the commissioner certifying that the proposed new occupancy and use conforms to the provisions of the laws governing building construction and that the proposed use will not be in conflict with any provisions of the labor law, multiple dwelling law or the zoning resolution.

HISTORICAL NOTES

Section added chap 907 / 1985 § 1

DERIVATION: Formerly § C26 - 121.5 added LL 76 / 1968 § 1